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ABSTRACT

This proceedings presents 18 essays that focus on collective bargaining and other labor issues in higher education. The essays include: (1) "Looking Toward the Future" (Sandra Feldman); (2) "The New Unionism in Higher Education" (Bob Chase); (3) "Post-Tenure Review: Threat or Promise" (Christine M. Licata); (4) "A Response to Post-Tenure Review: Questions and Perspectives" (Denise Marie Tanguay); (5) "An Observation on New Models for Institutions of Higher Education" (Gordon K. Davies); (6) "The University of Phoenix Model of Adult Learning" (Laura Palmer Noone and William Pepicello); (7) "Labor/Management Cooperation: The Saturn Model" (Jack O'Toole); (8) "Contracting Out of Government Services: Panacea or Poison?" (Robert Hebdon); (9) "Ethics and the University Professor" (Donald Savage); (10) "Academic Values" (Steven M. Cahn); (11) "Ethics, Collective Bargaining, and the Collective Agreement" (Allan R. Sharp); (12) "Rights and Responsibilities of Faculty: UNESCO Adopts an International Statement" (Donald Savage); (13) "One Union's Response to Technology: A True Dilemma" (Terry Jones and Gerie Bledsoe); (14) "Beyond Technological Determinism" (David S. Birdsell); (15) "Mending the Cracks in the Ivory Tower: Strategies for Conflict Management in Higher Education" (Susan A. Holton); (16) "Emerging Labor Issues" (Vickie A. Gillio); (17) "Campus Bargaining and the Law: The AAUP's Perspective" (Jonathan R. Alger); and (18) "Affirmative Action: Piscataway Township Board of Education vs. Sharon Taxman" (Stephen E. Klausner). Most essays include references. (MDM)

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RESPONDING TO CHALLENGES AND CONFLICT IN HIGHER EDUCATION COLLECTIVE BARGAINING

Proceedings
Twenty-Sixth Annual Conference
April 1998

CAESAR J. NAPLES, Editor
BETH H. JOHNSON, Conference Director

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National Center for the Study of Collective
Bargaining in Higher Education and the Professions
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Respondent's Perspective:
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INTRODUCTION

INTRODUCTION

As the century draws to a close, traditional institutions, techniques and relationships that have served higher education in the past are being questioned. Time honored approaches are under intense and sometimes hostile scrutiny and new principles are being advanced that call into question whether higher education should continue to advance in the ways it always has. The utility of tenure is being challenged in theory in legislative halls and in practice with the emergence of new types of institutions that operate in the ether. Affirmative Action plans and programs that changed the faces and minds of campuses across the nation are being scrutinized in the light of new claims of fairness. Where once claims of discrimination supported such plans, similar claims are being used to defeat them. It is appropriate that the only national organization and its annual conference that brings together leaders from faculty, staff, administration and governing boards address these new arguments seeking insights into traditional relationships. As the program presents viewpoints on these subjects from all parts of academe, it also serves the theoretician as well as the practitioner by providing an update on the law of higher education and collective bargaining.

LEADERS ADDRESS THE ISSUES HIGHER EDUCATION WILL FACE IN THE NEW CENTURY

Sandra Feldman is President of the American Federation of Teachers (AFL-CIO), having served for many years with her colleague Albert Shanker as part of the leadership team that has chartered the course of the AFT as a part of the AFL-CIO for most of this century. She shares with us her assessment of the directions our colleges and universities are taking including the dangers of riding the "market driven" wave. Aside from neglecting traditional values, slavish adherence to market forces tempt the public away from its appropriate role in providing appropriate and necessary support for our schools, colleges and universities. She makes an articulate argument for the traditional values of faculty governance, student-centered education, standards of quality and the encouragement of the love of learning.

Bob Chase is President of the National Education Association, the largest education union in the nation. He notes the rise of unionism in America's colleges and Universities and attributes this phenomenon to the challenges to traditional values and standards in higher education. Under the banner of cutting costs, more and more institutions of higher education are seeking ways around tenure and full time faculty and many more faculty members are looking to their unions to protect them and their interests.

POST-TENURE REVIEW

Christine M. Licata is Senior Associate, American Association for Higher Education and Associate Dean, Rochester Institute of Technology/National Technical Institute for the Deaf. Having written extensively in this area, she assesses the popular basis for renewed interest in post-tenure review.

Distinguishing between the different purposes for which post–tenure review may be employed – developmental or summative – she emphasizes that institutions need a better understanding of the process and its purposes before it institutes them. She notes the importance of faculty involvement in the creation and utilization of post-tenure reviews and raises thoughtful questions that should be addressed by any who would seek to initiate the process of post-tenure review.

Denise Marie Tanguay is Professor of Management at Eastern Michigan University and was an A.C.E. Fellow in 1997-98. She notes the rush to employ post-tenure review and expresses concern that it may not me accomplished in a proper thoughtful and intellectually rigorous manner. She reviews the recent literature concerning post-tenure review and the Report of AAUP's Committee A on Post-Tenure Review addressed by AAUP's National Council in 1998.

NEW MODELS FOR INSTITUTIONS OF HIGHER EDUCATION

Gordon K. Davies, President, Council on Post-Secondary Education, was for many years Commissioner of Higher Education in the Commonwealth of Virginia. Long known for his thoughtful and insightful academic leadership, he recognizes the attractiveness held by new models for the delivery of higher education. He analyzes the aspects of distance learning institutions and those focussed on career enhancement and suggests that supporters of traditional institutions might learn from these innovations.

Laura Palmer Noone is Vice President for Academic Affairs at the University of Phoenix and **William Pepicello** is Associate Vice President for Academic Affairs. In this paper, they describe one of the most successful of the new models of higher education institutions. Utilizing a carefully designed outcomes-based curriculum and practitioner faculty to bring higher education literally to the students' backyards, it describes its programs as student-centered and service-oriented. The University of Phoenix employs more than 4500 faculty members at more locations that any other institution of higher education in the nation.

Jack O'Toole is a senior consultant for Saturn Consulting Services Group, was a leading representative of the United Auto Workers union, and was one of the Saturn Company's 99 founders. This paper details the conceptualization and development of the Saturn Company with its unique approach to labor/management relations.

TECHNOLOGY AND CHANGING FACULTY ROLES

Terry Jones is President of the California Faculty Association, serving his second two-year term. He is a professor of Sociology at California State University, Hayward. **Gerie Bledsoe** is CFA's General Manager and served formerly on the national staff of the AAUP and the NEA as well as Michigan State University. This paper describes the ill-fated effort undertaken by the California State University System to joint venture with industry representatives from aerospace and computer manufacturing to install computers throughout the twenty-two campuses of the California State University. The authors describe the debate over process and faculty involvement as well as the political dimension that ultimately ended the effort.

David Birdsell is a professor at the Baruch College, School of Public Affairs. Dr. Birdsell posits that many commentators expect information technologies to transform higher education, often to the detriment of faculty rights and the quality of face-to-face learning in the classroom. This paper argues these faculty and administrations have largely unexplored common interests in protecting institutional reputation in the face of challenges from new delivery models heavily reliant on technology. Sustaining the perceived value of traditional higher education will require an aggressive, sophisticated use of information technologies and the development of realistic models of faculty workload and compensation.

CONTRACTING OUT

Robert Hebdon is Assistant Professor, New York School of Industrial and Labor Relations, Cornell University. As governments seek to economize, they may turn towards privatization as one means to save money. In this paper, Professor Hebdon presents a reasoned and researched analysis of contracting out of government services, drawing upon his study of instances of contracting out by local governments in the State of New York. He concludes that contracting out is not a panacea for fiscally strapped governments, and could well draw the wrath of unions that view contracting out as a challenge to collective bargaining rights.

ETHICAL STANDARDS FOR COLLEGE FACULTY

Donald Savage retired Executive Director of the Canadian Association of University Teachers notes the increase in incidents concerning the identification of ethical issues involving researchers in Canada. Considering documents defining ethical standards and proposing forums for their review in a government-issued proposal, he advocates appropriate standards that are developed jointly by institutions and researchers or teachers in collective bargaining agreements.

In a second paper, he describes the International Statement of Faculty Rights and Responsibilities adopted by UNESCO in November 1997 and which he played a prominent role in its creation. He takes the reader through the document – the first such document to be adopted by an international body – and highlights its salient parts: academic freedom; security in the form of tenure or something similar; and a section on terms and conditions of employment.

Steven M. Cahn, Professor, the Graduate Center, City University of New York, observes that while most professions have been subject to strict scrutiny either from within or without whether sufficient ethical standards exist and are followed, professors have been noticeably free from such scrutiny. Ethical scrutiny is appropriate for professors and should be accepted as part of the responsibility of the profession, he argues. If the professorate neglects to police itself in the ethical arena, others will likely step in.

Allan R. Sharp is a professor at the University of New Brunswick, and a member of the Association of University of New Brunswick Teachers. Although opponents of unionization in the academy claim that the formation and existence of faculty unions are antithetical to ethical practices at colleges and universities, Sharp argues that ethics are at the heart of the collective bargaining process, and that collective agreements actually promote high ethical standards.

DISPUTE RESOLUTION TECHNIQUES IN HIGHER EDUCATION

Susan A. Holton is Professor of Communication Studies at Bridgewater State College where she also served as Chair of the Department of Speech Communication, Theatre Arts and Communication Disorders, and as Assistant to the President. She is editor and co-author *of Mending the Cracks in the Ivory Tower: Strategies for Conflict Management in Higher Education* (Anker Publishing Co., Inc 1998) and *Conflict Management in Higher Education* (Jossey-Bass, New Directions in Higher Education, Winter 1995). In this paper, drawn from her book, Holton points out that the academy has traditionally been torn by conflict, which can be a useful way of dealing with growth and change. She and her co-authors suggest that the healthy results of conflict can be achieved if the methods for its resolution are inclusive, involving all parties to the strife.

ANNUAL LEGAL UPDATE

Vickie A. Gillio, an attorney with Gillio & Associates of Chicago, highlights important decisions issued within the past year. She deals with significant cases involving out-sourcing, the Family/Medical Leave Act, the Americans With Disabilities Act, bargaining status of part-time faculty in Alaska's colleges and universities and in Illinois, Teaching Assistants at Yale; and successor employers.

Jonathan R. Alger, Counsel to the American Association of University Professors analyzes major developments within the past year is several issues in higher education law of special interest to faculty members and their unions. Included are cases affecting eligibility for collective bargaining; sexual harassment; academic freedom; and affirmative action.

Stephen E. Klausner, an attorney with Klausner & Hunter of Somerville, N. J., presents a paper that contains the argument that *would* have been made before the US Supreme Court by Respondent, Sharon Taxman, if the case had not been settled and the appeal withdrawn prior to the Supreme Court's proceeding.

THE PROGRAM

The program of the Twenty-Sixth Annual Conference listing the topics and speakers is presented below. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. If an author was unable to submit a paper, the name appears on the program, but the remarks have not been included. Opinions expressed in the papers are those of the authors, not necessarily their organizations or of NCSCBHEP.

MONDAY MORNING, APRIL 20, 1998

WELCOME

Carroll Seron, Acting Dean
School of Public Affairs, Baruch College

Victor Gotbaum, Director
Collective Bargaining, SPA, Baruch College

KEYNOTE – HIGHER EDUCATION UNIONIZATION FOR THE 21ST CENTURY

Speakers: Sandra Feldman, President
American Federation of Teachers

Robert Chase, President
National Education Association

Presiding: Lois S. Cronholm, Interim President
Baruch College, CUNY

PLENARY SESSION A
POST-TENURE REVIEW: THREAT OR PROMISE

Speakers: Christine M. Licata, Associate Dean, Academic Affairs
Rochester Institute of technology

Denise Tanguay, Professor of Management
Eastern Michigan University, AAUP

Moderator: John McGarraghy, Professor of Higher Education Administration
SPA, Baruch College

CONCURRENT SESSION B
NEW MODELS FOR INSTITUTIONS OF HIGHER EDUCATION

Speakers: Gordon K. Davies, Visiting Professor
Teachers College, Columbia University

William Pepicello, Associate VP Academic Affairs
University of Phoenix

Terry Jones, President
California Faculty Association, NEA

Moderator: Frederick Lane, Professor of Public Affairs
SPA, Baruch College

CONCURRENT SESSION C -- "CONTRACTING OUT"

Speakers:	E.S. Savas, Professor of Public Affairs SPA, Baruch College Robert Hebdon, Professor of Labor Relations Cornell University
Moderator:	Joel M. Douglas, Professor of Labor Relations SPA, Baruch College

CONCURRENT SESSION D
ETHICAL STANDARDS FOR COLLEGE FACULTY

Speakers:	Donald Savage, Retired Executive Director CAUT
	Al Sharp, Professor University of New Brunswick, CAUT
	Steven M. Cahn, Professor Graduate Center, CUNY
Moderator:	Douglas White, Director, Co-Existence Center SPA, Baruch College

CONCURRENT SESSION E
TECHNOLOGY AND CHANGING FACULTY ROLES

Speakers:	William Graves, President COLLEGIS Research Institute
	Perry Robinson, Deputy Director Higher Education Department, AFT
	David Birdsell, Associate Professor of Public Affairs Baruch College
Moderator:	Samuel D'Amico, Associate Vice Chancellor, Human Resources University of Maine System

TECHNICAL SESSION F
STATE-OF-THE-ART TECHNOLOGY: A HANDS ON APPROACH

Speakers:	Mark Putter, Associate Director Baruch Computing & Technical Center & Staff

TUESDAY, APRIL 21, 1998

PLENARY SESSION A
ANNUAL LEGAL UPDATE

Speakers:	Jonathon Alger, Esq., Counsel AAUP

Vickie A. Gillio, Esq.
Gillio & Associates, Chicago
Stephen Klausner, Esq.
Klausner & Hunter of Somerville, NJ

Moderator: Edward Silver, Esq.
Collective Bargaining, Baruch College

PLENARY SESSION B
DISPUTE RESOLUTION TECHNIQUES IN HIGHER EDUCATION
Speakers: Maria R. Volpe, Professor, Dispute Resolution Consortium
John Jay College and President, SPIDR

Susan Holton, Professor
Bridgewater State College

Larry Glenn, Professor
Connecticut State University, AAUP

Moderator: Maurice Benewitz, Arbitrator
Founding Director, NCSCBHEP

PLENARY SESSION C – MEDIATION OF DISCIPLINARY ACTION:
A SEXUAL HARASSMENT CASE
Speakers: Susan T. Mackenzie, Esq. PC
New York City

John Donoghue, Esq.
Donoghue, Thomas, Auslander, Fishkill, NY

Lowell Johnston, Esq.
Johnston & Olivieri, New York City

Shelley Sanders Kehl, Esq.
McGuire, Kehl & Nealon, New York City

Denise Reinhardt, Esq.
Reinhardt & Schacter, PC, Newark, NJ

LUNCHEON
LABOR/MANAGEMENT COOPERATION: THE SATURN MODEL
Speaker: Jack O'Toole, Retired Senior Consultant
Saturn Consulting Services Group

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit, educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, The City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public. Among the activities are:

- An Annual Spring Conference.
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.
- An annual Bibliography, Collective Bargaining in Higher Education and the Professions.
- The National Center Newsletter, issued four times a year providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.
- Monographs – complete coverage of a major problem or area, sometimes book length.
- Elias Lieberman Higher Education Contract Library maintained by the National Center containing more than 350 college and university collective bargaining agreements.

ACKNOWLEDGEMENTS

Members of the National Center's National Advisory Committee and our Baruch College Faculty Advisory Committee provided us with great ideas for speakers and topics for the conference. Baruch College professors Joel Douglas, Frederick Lane, and John McGarraghy provided important suggestions, encouragement, and support throughout the many months of conference preparation. We are, of course, grateful to all of the speakers and moderators who so ably presented papers and guided the conduct of sessions. A special thank you is due to Caesar Naples, Vice Chancellor Emeritus and Trustee Professor of The California State University who took on the task and did such a terrific job of editing this volume. The *Proceedings* and conference are a group effort, and I gratefully acknowledge the help of all of those who assisted.

Beth Hillman Johnson
Administrative Director

I. HIGHER EDUCATION UNIONIZATION FOR THE 21ST CENTURY

A. Looking Toward the Future

B. The New Unionism in Higher Education

HIGHER EDUCATION UNIONIZATION FOR THE 21ST CENTURY

A. LOOKING TOWARD THE FUTURE

Sandra Feldman, President
American Federation of Teachers

Thank you for inviting me to share the platform with my friend Bob Chase this morning. I'm pleased to be here for at least three reasons. First, I'm glad to be part of a conference for union and management leaders who, I think, should be talking thoughtfully to each other a lot more, along with outside experts—especially since this is the only regular forum for analyzing the year's trends in collective bargaining on campus and looking toward the future. (And, of course, since it is celebrating its 26th anniversary.)

Second, it's good to be here with three old friends Irwin Polishook, Victor Gotbaum, and Ed Silver—who will be directing the Center's activities. It's interesting I can call them both friends. Victor, the old labor warrior, has always been on my side. But Ed was on the management side during some very rough negotiations, and believe me, there are some others I battled with too, whom I'd never call a friend.

And third, I'm delighted to be here because this meeting is in my neighborhood, and in my new position this is the first time I've been able to walk to a conference in a long time. And let me assure you: Walking is far more glorious than flying. Bob and I have been asked to speak to the subject of "higher education unionism for the 21st century." Well, I want to start with the premise that there is no single predictable future for unionism or for higher education. There are many possible futures. Some we like, some we don't.

Right now, almost everything about the American college and university system seems to be open to question. The practices and policies that direct our institutions of higher learning, the ideals that underpin them—all are being challenged. Will colleges in 2010 look anything like the institutions where WE studied and got our degrees? Is the idea of the college as a place where students come to learn from a group of scholars outdated?

Will college teachers continue to work as a body to shape an institutional curriculum and teach and grade courses? Or will the community of learning be broken up—with some people working for companies that develop courses, others coaching students in classrooms, or managing online courses, and still others working for outfits that specialize in student assessment? Will coursework become, as some people say, more "consumer-oriented" and "market driven"? We don't yet know the answers to these questions—or to the many more that are currently being tossed around. And of course the upheaval in our institutions means that higher education unions face challenges that are even more pressing and serious than the ones my colleagues had to meet when we started to fight for collective bargaining thirty years ago.

I find an awful irony in the present situation. On the one hand, we have many reasons to be proud of our higher education system and grateful to it. Our colleges and universities are admired all over the world—and deservedly so. They produce the scientists and thinkers and artists who make our country a world leader and innovator. University-based research is fundamental to the country's economic growth and it continues to improve our quality of life. On an individual basis, a college education is still seen by most people—correctly—as the best road to a financially secure, professional future.

Yet, on the other hand, this excellent higher education system is in serious trouble. So—how can we explain the contradiction? Well, there are many causes: Social change contributes to challenges faced by higher education. So does technological change.

But the most disturbing reason, I believe, is a political climate in which the center hasn't held, and politics have moved to the right. Serious questions are being raised about spending public money on public services that many of us consider absolutely basic—like Social Security or Medicare. And when you add to this the extremists who frankly want to dismantle government altogether—the school voucher proponents are among them—it is no surprise that public higher education is facing challenges that could not only alter its character, but, indeed, could destroy it. For too many people, the desire to save money and pay less in taxes now eclipses every other consideration.

I fear, too, that the perception of what education is and why it's valuable has undergone an alteration—and a coarsening. Instead of educating the whole person—intellectually and morally, as well as professionally—we now see a nearly exclusive focus on preparing students to earn a living.

This limits the students, and, at the same time, robs our society of people who can think beyond their narrow area of expertise.

It robs us of people who care about things beyond the circle of their immediate lives.

In higher education, the most obvious sign of these political shifts is diminished funding for higher education. I don't need to tell you what this has meant. Not enough to keep up the physical plant or make necessary improvements. Not enough to improve, or properly maintain, faculty salaries and benefits. Not enough to hire full-time faculty members—and this has led to a huge increase in poorly-paid part-timers.

But something even worse is happening as a result of the reduced funding for higher education: a reneging on our country's commitment to offer a college education to all who can benefit from it, regardless of their ability to pay; a commitment which perhaps was stronger in this city than anywhere else.

Schools are passing on more and more of the cost of education to students and their families. Between 1980 and 1994, tuition at public four-year institutions rose 234 percent, more than three times the rate of inflation. I find this more disturbing than I can tell you. Higher education meant everything to me—as I know it did to many of you.

I grew up poor in Coney Island and would not be here today but for the free—and excellent—education I got at Brooklyn College. In my classes there, I not only learned the principles of philosophy and civics; I was introduced to authors whose work influenced and shaped my life. I discovered that it's okay to think and express contrarian thoughts, to debate ideas with others, and to push for my point of view. College was the cauldron in which was shaped my sense of responsibility to the planet and my fellow human beings. I became an activist—and I also learned the sheer joy of sitting back and immersing myself in great books and great music. But the golden opportunity that I and so many like me benefited from, is being threatened.

Another result of the drying up of money is one I've already mentioned: the tremendous growth of part-time faculty,-- coupled with the loss of full-time, tenured faculty positions. And it's a change that's already having a profound effect on colleges and universities across the country. Many of you know the statistics. Between 1987 and 1992, full-time faculty positions rose only 2.6 percent while part-time positions rose 47 percent. Now, in 1998, full-time tenured faculty constitute only about 38 percent of the workforce, and shrinking; part-time faculty constitute about 45 percent of the academic workforce, and growing. And many of these part-timers have no job security, no benefits, and the academic equivalent of sweat shop wages.

Of course, part-timers have a legitimate role in higher education. They are usually highly qualified and dedicated teachers, who make real sacrifices in order to continue college teaching—and real contributions to the students they teach. At the same time, it's obvious that the level of growth we're seeing in part-time faculty is way out of line and the overriding motivation is to save money, not to make education better. We have a lot to lose if this trend continues.

As you well know, college faculty are not people who come in, teach their courses, and go home. They belong to a community that sustains and nourishes the institution of which it is a part. The curriculum in a department is the result of ongoing discussion and debate. To the extent that colleges and universities are self governing, faculty give their time and energy to that endeavor. At the simplest level, teachers meet with students to answer their questions and offer them intellectual guidance. And part-timers, though they are usually qualified to do these things, aren't being paid enough and just don't have the time. If your livelihood depends on putting together a schedule of five of six classes at three local schools, committee work or student advising is probably out of the question—even if the schools permit part-timers to engage in these activities. So institutions and students suffer when the percentage of part-timers rises too high.

Another trend that is often—not always, but often—driven by financial considerations and that looks as though it could alter higher education significantly in the next few years, is distance learning. One teacher could teach—service is often the word critics insist on—thousands of students who are unconnected by anything but cyberspace. And skeptics must ask, is this education?

I think we have to be careful here because distance learning has a lot of potential, a lot of power, and it can expand the possibilities for learning in a number of ways. The most obvious is the expansion of time and place. For example, I just read a news story about a fortyish government worker from Ohio, who is—finally—studying to get his bachelor's degree—from a college in Washington state, over 2,000 miles away. Of course he doesn't have to go to the campus to take his courses; nor does he have to log on to the Internet at any particular time. After work is fine. So there are possibilities here for second and third chances at college work and for lifelong learning that we certainly shouldn't dismiss out of hand. And there are even possibilities for people to log on in the middle of the night for the sheer pleasure of learning something new.

Nor can we ignore the chances for students to widen and deepen what they study. I heard recently about some undergraduates at the University of Pennsylvania who are participating in a course taught by a world-famous expert. And he's not in Philadelphia. He is giving the course, via cyberspace, from the University of St. Andrews in Scotland. In addition to getting access to the professor's lectures, students will be able to post their questions and take part in what amounts to a worldwide forum on the subject of the course (which happens to be, interestingly enough to this audience, on Divine Mediators in Ancient Jewish and Christian thought).

This is exciting—and it's an opportunity that is possible only because of distance learning. But at the same time, there are serious problems, and the biggest one is quality.

Although the prospect of saving large amounts of money is probably a fantasy in most cases, it is leading many legislatures and college administrators to jump in without giving nearly enough attention to making distance learning what it can and should be. Expenditures for equipment are not being matched by expenditures to train faculty and students to use new technologies. And there is not enough attention to how online courses should be designed so they offer an exciting and high quality alternative to traditional courses. Indeed, at this point it is not frivolous to wonder if colleges and universities of the future will be overwhelmed by trashy on-line money makers.

A lot has been written about the dumbing down of college courses, and much debate has centered around multiculturalism and its ramifications. And I think all of those are problems. I want rigor and intellectual integrity, and I love Shakespeare and Socrates. But, frankly, I think there is a greater threat: and it is in what some critics foresee as a higher education sector that is more consumer-centered and market driven-just like many other sectors of our society.

I have no argument with this if it means taking a new look at the structure of the academic term and the awarding of credits, or improving the quality of university teaching. In fact, higher education unions, in many places, are working through collective bargaining to further these kinds of aims. And we need to do more. But if this educational consumerism is telling us to focus our courses more narrowly on the things students already think they want to know, that is exactly the wrong way to go. We need to preserve in our colleges and universities the ideal of learning for its own sake. We need to help young people discover the excitement of following an idea wherever it leads; to open the minds and hearts of students to writers, artists, composers and thinkers.

Colleges and universities have always been places where students were led to experience the love of learning. I'm afraid this is being threatened by a crudely utilitarian view of education that says only job training or ultimate material success is valuable. And students are buying that view big time. I don't have to tell you how much students will lose if this attitude prevails—or how immeasurably impoverished our society will be.

Thus, for all our successes in higher education, we face an uncertain future. And there are some very disturbing possibilities. Higher education might be forced to offer opportunity to fewer people. Or it could become a two-tier system, with one level of excellence for students who have the money to be on campus and a different—and inferior—level for students who attend via cyberspace. With the exception of a few elite colleges, this higher education system might not be characterized by strong institutions or a coordinated curriculum developed by faculty. Instead, a college program might be based on individual courses, or packages of courses, competing to attract consumers with their punchy design—and their painlessness.

Strong departments staffed by people committed to their institution and their discipline might be replaced by a faculty consisting primarily of itinerant course designers and teachers forced to go wherever they could piece together a living. As for academic freedom—well, it would probably be moot. Few people who keep their jobs on sufferance are interested in speaking their minds.

One obstacle to the trends I've been sketching is the traditional autonomy of the faculty in higher education, and their unions. And that is why, in my view, we are in the midst of such a concerted attack on both faculty *and* unions.

The assaults are never ending. One day brings an attempt to eviscerate shared governance. The next day there is some proposed legislation to curb tenure. Then we see attempts to increase teaching loads and to impose some cumbersome, meaningless chores masquerading under the label of faculty accountability.

A corollary of the attack on faculty is an all-out attack on faculty unions. A couple of years ago, for example, the Illinois legislature wiped out dozens of subjects from community college contracts. For good measure, the legislature took one of the four- year campuses represented by the University Professionals of Illinois out of the bargaining unit. Last year, I'm told, this conference heard from one of the new brand of so-called "activist trustees" at the State University of New York. After telling you that she did not believe in collective bargaining for higher education faculty, she went on to debate with Bill Scheuerman, who leads the SUNY union, about a plan in which the board would have the authority to close whole departments, reconstitute those same departments as independent entities, and then contract out to these entities to teach the same courses, using the same faculty. The only difference was that the faculty would no longer have the protection of the union. Well it didn't happen—but it could have, and we still have reason to be wary.

In fact, all of organized labor faces this kind of threat. The latest and most awful incarnation is a referendum in California, the so-called Paycheck Protection Initiative. If that passes in June, --as it seems it may—unions will have to get written permission from each member each year to use his or her dues for political or legislative purposes. The state of Washington has already enacted a variant, which has, by some estimates, reduced union contributions up to 80 percent. Twenty-eight states are currently considering similar proposals. The ultimate aim of these bills and initiatives, of course, is to silence the voice of the worker in the political process—and we are in a major fight, along with the NEA and the rest of organized labor to defeat this. Frightening things, these are—and not just for unions, but for all Americans; certainly for those who care about fairness and balance in the political process and who shudder at the idea that only those who have millions of dollars to spend will be heard.

All this brings us back to the central question: What is the union to do? We could mount a holding operation—try to plug the holes in the dike with as many fingers as we can muster—but that's the same as admitting defeat. Or we could consider becoming a different kind of union—a model more like Actors' Equity than a traditional teachers' union. That is, we could organize academic professionals individually, rather than organizing institution-based locals. Unattached teachers in cyberspace, for example. Or we might try a freestanding organization of part-timers.

Unions need to respond to new and different needs by taking new and different forms, and believe me, some of us are thinking along these lines. But there are other things we should be focusing on right now. First of all—and let me be frank with you here—I think we have to look at the quality problems that leave higher education vulnerable to attack-just as similar problems leave K-12 education vulnerable.

When the public reads story after story about college students taking remedial courses, it doesn't sit well. People don't like to think young people are getting their high school education, at taxpayer expense, in a college or university. And they feel taken advantage of when they read stories about grade inflation, high dropout rates, and dumbed-down curriculums—whether they are about higher education or K-12. These conditions encourage demands for the immediate shutting down of all remediation, even at the community colleges, without any time to phase in higher standards. And they give ammunition to the people who want to dismantle the higher education system as we know it. Personally, I want to see a time when four-year colleges no longer have to provide remediation, and when community colleges have to do it minimally. Not cold turkey—but soon.

Because while some of the quality-related criticisms are misplaced, it's essential to be honest about the ones that stick. As a union, we've tried to do that in K-12 education, and I believe we are having some success. But with so many unprepared students still coming to higher education's door—especially in the community colleges—too many classes are being conducted at a high school, or even a middle-school level. Too many students aren't making it. And it would be foolish to argue that this has no impact on the content of courses and grading.

An argument about which comes first – the chicken or the egg? – isn't a helpful discussion. K-12 and higher education simply must work together to strengthen the high school curriculum, and raise graduation standards, and create tougher admissions standards. As you are well aware, this will not be an easy lift. To the degree that we succeed, some people, including some of our own people will criticize us for being elitist. But when we settle for giving college students—or K-12 students a substandard education, we are cheating them and we are contributing to the demise of our institutions.

A good example of a program that's working is New York City's College Preparatory Initiative –CPI. Under CPI, higher standards are being phased in at both the New York high schools and the City University of New York. The unions took the lead in implementing this program, and early results are promising. High school students who want to be admitted to CUNY are taking tougher courses, and the grade averages of CUNY applicants are rising—a nice example of how raising standards leads to higher achievement. And once in college, CPI students are earning more credits, achieving higher grade point averages, and are more likely to return to school after the first year. Faculty and faculty unions need to get more involved in these kinds of efforts to raise standards because they embody principles that will help us shape the university to come according to our ideals and dreams. Let me talk for a few moments about what these principles are. I know many people think that a union's only real goal is to protect members' paychecks and benefits. Well, we do care about paychecks and benefits, and I don't apologize for that. Colleges and universities can not continue to attract top-notch faculty if they offer low and unstable pay, few benefits, and the life of a gypsy. But anyone who thinks that higher education unions care only about protecting members is just not looking or listening.

I think the principles that will help us ride the forces of change in higher education instead of being swamped by them are exemplified in some of the ideas I've just been talking about and that AFT has been pushing:

I) Students have a right to an excellent and affordable education but they must also be held to high standards.
II) Faculty are accountable for their role in supporting and furthering educational quality.
III) The continuing excellence of our colleges and universities depends on their continuing to nurture the life of the mind.

These principles can be boiled down to three words: opportunity, quality, and accountability. In fact, they form the basis of an AFT higher education initiative, called First Principles. First Principles presents a simple, commonsense agenda for what makes a good higher education. It serves as the basis for the positions AFT locals take on issues like full-time faculty, tenure and standards. And it is being followed by locals all over the country. You have a copy of it among the materials you received today, and I invite you to read it. As you'll see, the First Principles statement is not revolutionary—unless being commonsense is revolutionary these days. It embodies things college faculties and unions are already doing—and need to do more of, and it can serve as a point of reference for future efforts to preserve the essential core in our higher education system during a period of change.

Our union, then, moves into the 21st century with a set of principles and a commitment to improve education. But having principles and commitment does not guarantee prevailing in the political arena—and that's where many decisions about the future of higher education will be made. How do we work up the tremendous strength we will need to move our agenda forward?

One important way is to grow. And we are going to grow whether or not AFT and NEA achieve merger. But think of the possibilities if the merger goes through. A unified organization would be the largest union in America with 3.2 million members—which means 3,000 in every Congressional district in the country. Our greater power is likely, in turn, to attract new institutions into the fold, to encourage faculty in unorganized institutions to try to unionize. We'd also have more clout when we pushed for better collective bargaining laws; and we'd be in a better position to get legislation passed that would reverse the Yeshiva decision, which continues to deny the right to organize to faculty at most private colleges and universities. Whether or not we achieve merger we'll work together on these goals.

We will also continue to organize; including part-time college faculty. AFT is already the leading organizer of part-time faculty among the unions, with 35,000 members. Just recently, we added 2,000 adjuncts in the New Jersey state colleges and another 1,000 at the University of Alaska to our union roster. And NEA research shows that unionized part-time faculty are better paid than their nonunion colleagues; they are more rigorously evaluated for employment, hold more office hours; and they are more stable in their jobs. This is good for part-time faculty and it's also good for quality at the schools where they teach. And frankly, by reducing the financial incentive for institutions to employ an avalanche of part-timers, we hope to build more opportunities for full-time tenure track jobs.

One of the most promising prospects for growth in the labor movement resides in professional unions. AFT is proudly affiliated with the AFL-CIO. Under the proposal we and the NEA have made to our memberships, the new union resulting from the merger would also be affiliated with the AFL-CIO and would immediately add 700,000 members to the AFL-CIO's ranks. This, I hope and believe, would be just part of a broad expansion of unionism among professionals. From the standpoint of labor, the most important shift in our economy since the 1 970s has been the shift from goods to services. This has brought about an enormous increase in the number of white collar workers, particularly professional, technical, and administrative support workers. If we are able to raise the proportion of unionized white collar workers above 11.4 percent, where it is now, the labor movement could make significant increases in its membership. And doing that will require focusing on the quality issues, on the issues of worker voice, workplace democracy, institution building, and, yes, on labor-management partnerships. I strongly believe that collective bargaining can and should be the arena in which to make those things happen.

As we look to the next century, there is no shortage of disturbing trends and wrongheaded ideas, but there is also a prospect for growth in higher education unionism, and with it, growing power to advance our quality education agenda. Because we would use that power to maintain strong academic institutions. We would use it to move educational considerations front and center in policymaking. We would use it to ensure that the wages and working conditions of college faculty continue to attract the best people into academic life.

We would use it to increase access and raise the quality of our institutions. Bob Chase talks often about this under the rubric of the "new unionism." I couldn't agree with him more. Faculty need to take charge and foster reform where it is needed. We are not committed to a particular organizational structure or a way of doing things. But we will stay true to our principles, and we will initiate or react to reform proposals on that basis.

I don't know if we can carry all our points or even win substantially. I do know we're tenacious and tough and we won't stop trying.

I personally will never stop trying to make sure that in the America of the future, our children and grandchildren will continue to be able to explore and participate in the expansion of knowledge; and to live in a democratic society where civility is the norm, not because it is paternalistically imposed, but because our citizens are well-educated, in the very fullest and best meaning of the word.

HIGHER EDUCATION UNIONIZATION FOR THE 21ST CENTURY

B. THE NEW UNIONISM IN HIGHER EDUCATION

Bob Chase, President
National Education Association

It's an honor and pleasure to be here. An honor because as keynote speaker for this conference I follow in some very distinguished footsteps—Al Shanker, Clark Kerr, Clifton Wharton, and others. And it is a pleasure because I can report to you this fine spring morning that trade unionism and collective bargaining are alive and well in higher education.

Indeed, there has been more union activity in higher education in the past two years than the previous ten. But as a union president, I have to confess to you that I can't take any credit for the surge. This renewed interest in unionism is springing up directly from the grassroots, from the men and women who teach in our nation's public colleges and universities.

Why? Well, I think we all know the reasons: increased reliance on underpaid and sometimes underqualified part-time teachers; increased infringement on faculty members' intellectual property rights; increased use of distance education, the so-called virtual university; increased efforts to undermine tenure and the faculty's role in decisionmaking.

Faced with such an onslaught of threats, that old bugaboo – I am a professional, I cannot join a union – quickly gets turned into: "I am a professional, therefore I must join a union to protect my professional integrity." Indeed, such an onslaught of threats gives new meaning to Shakespeare's admonition in *Henry VI*:

"Yield not thy neck
To Fortune's yoke."

Or as one of our more blunt member-organizers likes to tell his fellow faculty members: "Hey, without a union, we're chopped liver, baby."

The parallels between unionization in higher education and in health care grow more striking by the day.

Under the guise of holding down costs, health care professionals – doctors and nurses – are being pressured, by HMOs and hospital privatizers, to cut corners in patient care and compromise their professional integrity. This is happening every day all across the country, and it is a disgrace. Consequently, more and more health-care professionals – yes, even doctors – are unionizing.

Most of the threats to the professional integrity of faculty members are also justified in the name of holding down costs.

The tenured and tenure-track faculty at Southern Illinois University in Carbondale two years ago voted overwhelmingly to join NEA. Why? Because of the university's increased hiring of underpaid and underqualified part-time teachers and the administration's growing habit of ignoring the faculty's voice on quality-of-work issues.

PROFESSIONAL INTEGRITY VERSUS HOLDING DOWN COSTS

At Ferris State University last fall, the faculty union had to strike to protect their right to participate in governance of the campus, including peer review.

At the University of the District of Columbia, NEA had to go into court to overturn a decision to layoff qualified and dedicated tenured faculty members. Professional integrity (and basic human decency) versus holding down costs.

At the risk of ruining your morning, let me sketch for you my worst nightmare for American public higher education.

In the name of holding down costs, the management of all public colleges and universities will be turned over to EMOs – Educational Management Organizations. These companies will be well financed because venture capitalists who made millions in HMOs and privatizing health care will invest in them. So will publishing and software giants. So will the entrepreneurs who figured out how to reap profits in the $400-billion-a-year public K-12 market.

In the name of holding down costs, all faculty members will become contract employees. What could be more American? Individuals sitting down with an employer to cut the best deal they can! Oh, and incidentally, the EMO will hold the intellectual property rights of faculty members' work. EMO investors will insist on it. Conservative state legislators and governors, with a wave of approval from a conservative Congress, will have paved the way for this new higher education landscape by simply abolishing the collective bargaining rights of faculty at public higher education institutions.

In the name of holding down costs, most undergraduates will spend precious little time on campus, especially during their first two years. The curriculum will be conducted through the computer and video conferencing. The virtual teacher with a virtual classroom, virtual office hours, and virtual tests will become very much a reality.

That's my nightmare. Sound farfetched? If the cost of higher education keeps on rising, I think the siren call of a market solution, embossed with a high technology gloss, will prove irresistible. The ever-ebullient Speaker of the United State House of Representatives has already proposed a future much like the one I just described for higher education.

Ah, you ask, but what about the ancient rights and privileges of college and university faculty? What about academic freedom? What about tenure? What about peer review? My friends, they will become a historical anachronism like the traditional doctor-patient relationship is becoming today. The market is a fearsome and very unsentimental force once unleashed. So what do we do? The Danish prince agonized over:

> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune,
> Or to take arms against a sea of troubles

One of the good things about being a trade unionist is that you don't waste a lot of time or angst over such a question. You take arms against a sea of troubles. Staying with *Hamlet* for just another moment, let us recall that the Norwegians, led by the ambitious Fortinbras, would never have sacked Elsinore if the Danes hadn't been fighting each other.

I think it vital that higher ed faculty and administrators address the question of rising costs. Together. Let us find ways of controlling costs without devaluing our currency, that is, without reducing the quality of the education we provide to students.

Notice, by the way, I used that traditional term "student," not "customer." If we, as educators, buy into the faddish idea that "students" are really just "customers," we will have cooked our own goose. You do not demand of a customer what we demand of our students. You do not challenge a customer to stretch his or her mind like never before. You do not flunk a customer. Student is a noble word, dating back to the Latin and meaning one who studies. Let's use it, proudly.

Now, back to controlling costs. I commend to you the report of the National Commission on the Cost of Higher Education. It found that while faculty's salaries and workloads have not driven up costs, rather, it found that higher education institutions have not managed their finances well. The commission warned that public concern about the cost of college was real. If colleges and universities do not address the issue, the report said, it could lead to "a gulf of ill will between higher education and the public they serve."

And that is exactly what is happening. The American Federation of Teachers and the National Education Association issued a joint statement regarding the Commission report. We agree. We want to be at the table when campuses deal with these tough issues – and it is our goal to make sure that a gulf of ill will does not form between the public and its colleges and universities.

I am convinced that our unions can do justice to our traditional union concerns of seeking better pay and working conditions for our members and work with administrators to improve the quality of education. I am convinced we can and must do it.

At Springfield Technical College in Massachusetts, the faculty union and administration have worked together to create a governance document to insure quality education for the students.

At Oakton Community College in Illinois, the faculty union and administration have forged a long-term, cooperative labor-management partnership.

At Eastern Washington University, the faculty union and administration have negotiated a contract that directly addresses the quality issue. Under the heading of "improving productivity," for example, the union and administration agree to take steps specifically aimed at increasing graduation rates, reducing the dropout rate among new students, and improving the quality of instruction.

And in Florida last year, NEA's United Faculty of Florida and the State University System Board of Regents negotiated a contract without all of the prolonged posturing and rancor that characterized previous negotiations. Both sides came together as colleagues. They focused their energies on issues rather than on staking out positions. It worked. They call it "interest-based" bargaining. Both sides emerged from the process in a positive rather than embittered frame of mind – eager to keep their problem-solving focus throughout the duration of the contract.

Working together, we should make tenure more of a quality of education issue and less of an academic freedom issue. Instead of resisting distance learning, we should work together to ensure that the virtual university is a quality university. And working together, we should help college instructors improve their teaching skills through peer assistance and review and through serious professional development.

The other great issue for the faculty union and administrators to work together on is access to higher education for minorities and low income students.

Sixty-two percent of high school graduates now go on to either a two- or four-year college. But for minorities that number is much lower. While 83 out of every 100 African Americans now complete high school, only 40 attend college. Worse yet, only 12 African Americans out of every 100 earns a bachelor's degree by age 30. And only ten of every 100 Hispanics earn a degree. The percentage of Hispanic high school graduates attending college has actually declined in recent years.

We don't have similar figures for low-income whites, but I would guess they are equally dismal.

These statistics describe an extremely unhealthy situation. Our society is growing more and more diverse ethnically and racially. A time will come in the next century, in fact, when there will be no majority – everyone will be in a minority. Our economy demands an ever-growing supply of college-educated people. High tech jobs are going begging today in the Washington, D.C. area, in Silicon Valley, and in the Pacific Northwest.

Race and class should have absolutely nothing to do with access to higher education. It makes no sense, pragmatically or in terms of the democratic ideals we espouse. Our nation was built by people who could never have gotten into Europe's fanciest universities—Cambridge, Heidelberg, the Sorbonne.

Faculty unions and administrators need to work together to keep the doors of academe open to every student who is qualified. We need to work together to increase the amount of financial aid available to students. We need to work together to help our colleagues in the K-12 schools improve the quality of education they provide. We need to work together to do a better job of holding on to the students we already have. The drop out rate for minority students is much higher than for white students. As a matter of fact, we are doing a poor job of holding on to the students of all races who are the first in their families to attend college.

Let's acknowledge that college is an alien planet for many young people, especially for young people from families who have never experienced higher education. Those students need mentors. They need our active support.

There is a wonderful Chinese proverb: "You can't prevent birds of sorrow from flying over your head, but you can prevent them from building nests in your hair."

Of course this new path – this new unionism I am advocating – unions and administrators working together to control costs while improving quality – comes with certain risks. We risk incurring the wrath of the ideologues, both right and left, who don't think we can or should work together. We risk having our very integrity challenged. Worst of all, we risk failure. Incidentally, AFT President Sandra Feldman and I run the very same risks in pursuing the unification of our two organizations.

For me, these are risks well worth taking. After all, it is only by taking risks that we'll keep the birds' nests out of our hair.

Thank you, and may we have a challenging conference.

II. POST-TENURE REVIEW: THREAT OR PROMISE

A. Post-Tenure Review: Threat or Promise

B. A Response to Post-Tenure Review:
Questions and Perspectives

POST-TENURE REVIEW

A. POST-TENURE REVIEW: THREAT OR PROMISE

Christine M. Licata, Associate Dean,
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The post-tenure review movement has spurred intense national interest and controversy. Brought to attention well over fifteen years ago by the 57-member National Commission of Higher Education (1982), post-tenure review was described at that time as one of the most pressing issues facing higher education. The Commission believed that "nothing would (sic) undermine the tenure system more completely than its being regarded as a system to protect faculty members from evaluation."[1] Curiously though, the academy did not heed this call, and as one commentator recently observed, "...(it) dawdled until the public began to demand that the academy explain itself or surrender its prerogatives."[2]

Recently fueled by the accountability mantra and fired by the public's diminishing confidence in higher education, the issue of tenure's viability and utility continues to be debated again by policy makers in state after state. Cascading from such tenure debates, post-tenure review policies have been used in some settings as a way to remove from the legislative and board table, actions aimed at abolishing tenure. In so doing, post-tenure review is seen as a process that offers assurance that faculty performance, productivity and vitality are taken seriously. And, most important, that such quality control can prevail without dismantling the entire tenure system. In some states, discussions about post-tenure review have commenced in anticipation of such external pressure. In all states, this activity has been characterized by acrimonious exchange.

The title of today's plenary session captures precisely the polarity that usually plagues any discussion of this topic. These reviews are passionately scorned by some as a veiled threat to undermine the fabric of academic freedom and collegiality; as unnecessary over-administration in light of collegiate evaluation practices that may be in place; as an overly burdensome process in terms of resources required to carry it out; as another attempt to displace the academic culture with the corporate culture; and as a hollow guarantee that the process will positively affect faculty performance, productivity and professional growth. On this point McPherson and Winston in their work on the economics of tenure suggest that the way the academic employment market and academic contractual property rights are defined lead to the conclusion that there is not really any way to make "marginal adjustments to faculty workers' job assignments."[3] Because of this, they suggest that there isn't really any role beyond probationary oversight for monitoring faculty workers, which by contrast in the corporate world is used to shape career advancement. They posit that, "given the [internal] logic of the academic employment structure, it is far from obvious that intense hierarchical efforts to evaluate and motivate senior faculty in fact make much sense."[4]

Proponents of post-tenure review, on the other hand, resonate enthusiastically to its promise and reject the belief that a certain number of under-performers is to be expected and accepted. These advocates point to the opportunity that post-tenure review hold: for enhancing and rewarding continuous faculty development; providing a process to adjust the mix and balance of faculty activities better to match career goal interests; providing ways for bringing individual discipline interest and talents into closer connection to collective departmental priorities; and assuring stakeholders that the tenure covenant, which presumes continued competence, is being met. In a brilliant analysis, William Plater argues that "using tenure may be the only way to preserve it."[5] According to Plater's thesis, because tenure is a code of shared responsibilities, faculty must reclaim tenure by exercising it. The exercise of it includes "setting standards for performance, holding all members of the academic workforce accountable and taking actions to improve those who are not meeting their responsibilities. In such a community, tenured faculty have the responsibility to act for the welfare of all which includes taking steps beyond ordinary accountability—steps that include post-tenure reviews."[6] In reinforcing the idea of community and collegial development, William Tierney advances the notion that, "faculty members—by bonds of reciprocal obligation—should seek to develop one another's performance."[7] Tierney cautions, however, that "all too frequently (we) faculty do not take great enough responsibility for one another, and the kinds of difficult conversations that need to take place are studiously avoided."[8]

Unfortunately, the general public understands the issues surrounding post-tenure review through the frenzy that has occurred in the media. Headlines and sidebars like the following, shape the perceptions of an already confused and at times misinformed public:

> "In a justifying era, profs must justify their work. The sins, mistakes, or shortcomings of a few will result in the inconvenience of many." (Roanoke Times, Editorial, October 1, 1995)

or the message found in a recent New York Times (January 4, 1998):

> "The Ivory Tower Under Siege: Everyone Else is Downsized. Why Not the Academy?"

In this article, the President of the AAUP, James Perley, comments that the AAUP is fighting the spread of post-tenure reviews because "wherever they are adopted, only one percent of the faculty reviewed gets poor marks so why create a whole new program to do something that really doesn't need to be done?"[9]

The fact of the matter is that higher education's experience with post-tenure is much too recent and too anecdotal to yield any factual conclusions regarding outcomes or impact. There isn't even a national statistic regarding the number of institutions that have such a process in place; although at last count over thirty states reported some stage of involvement.

Through the work carried out over the past eighteen months by the American Association of Higher Education's (AAHE) New Pathways Project, over 100 policies and reports on the topic were reviewed and selected interviews were conducted with system administrators, campus officials and faculty leaders within settings characterized by post-tenure review. [10] From these data, seven general themes and a myriad of vexing questions emerge.

THEMES AND TRENDS

[The information reported here draws heavily on data collected and reported in : Licata, Christine M. and Joseph C. Morreale. Post-Tenure Review: Policies, Practices and Precautions. Washington DC: LAAHE, March 1997.]

1) External Pressure

Recent efforts to institute post-tenure review are principally the result of external pressure for accountability from legislatures, governing bodies and the public in general.

2) Conflicted Expectations

Formulating discussions are laden with varying beliefs and often times conflicted expectations about why these reviews are needed now and what their primary purpose should be. Ambiguity exists around whether the reviews are intended primarily as a carrot or a stick; designed to tune or prune? Despite these varying perspectives, an analysis of existing policies shows that in the vast majority of cases both formative and summative purposes are outlined within the same policy language. In short, dual purposes are espoused.

3) Evaluation Models

In the field, three basic models are followed which build on the annual review and do not replace it. What differentiates these particular models from the annual merit review is that performance is assessed in a systematic and comprehensive way; peers are involved in significant measure; professional development goals and plans are required and in many cases the process makes it easier to take action to remediate and/or remove chronic non-performers.

- Summative

The first model is *summative* in design—termed consequential by some and managerial by others. It rolls out as either:

- "Periodic review for all" at some interval, usually every five years, at which all tenured faculty are reviewed (as is the case in Georgia, Hawaii, Maryland, North Carolina, Wisconsin).

- "Selective review for some" which is usually triggered by a number of unsatisfactory annual reviews (as can be seen in Arizona, Kentucky's College of Arts and Science, Minnesota, and some Texas A&M schools).

- Formative—Developmental

The second model is *formative* in design and seeks development and growth. This type of review emphasizes the creation of a professional development plan, identifies individual faculty career interests and in some cases integrates them with the academic needs of the university. Rarely do recommendations from these types of review result in any personnel action.

- Annual Review of Substance

The third model, found in a very few select institutions, is an approach that begins by strengthening the annual review process to make it a review of substance. In so doing, changes are made so the process assesses achievements over longer periods of time; includes a longer-term professional/career-planning component and directly involves peers in the assessment.

It is clear that we do not know which of these approaches is more effective in terms of overall impact and which is more efficient in terms of resource utilization--although institutions adopting the triggered approach usually use conservation of resources as a reason for electing that model.

4) Favored Design Characteristics

Regardless of the model chosen, successful institutions recognize the critical nature of certain underlying and unifying principles. These principles stress the need in the design stage to: [11]

A. Articulate a clear, agreed-upon purpose: one that interfaces well with existing evaluation cycles, development practices and reward structure.

B. Reaffirm tenure as protection for academic freedom in the policy statement itself.

C. Involve in a deliberative and substantive way faculty and administrators at all levels of discussion and design.

D. Provide considerable flexibility and decentralized control at the local level for determining specific procedural aspects—a system in which overarching principles are established by a coordinating group and the specific components of implementation to campuses and departments to help shape.

E. Base assessment of performance on accurate, defensible and reliable information. Anecdotal and casually regarded evaluation data are no longer acceptable.

F. Include significant peer involvement—usually in the form of a peer committee. While this places additional demands on peers, it is seen as a critically important component because it establishes a collective responsibility for quality.

G. Establish clear standards for what constitutes satisfactory professional performance so that all can be judged fairly against the standard. This is best accomplished by remanding such determinations to the local unit where the definitions of acceptable teaching, scholarship and service are normally set.

H. Regardless of model, highlight the importance of a professional development plan as a centerpiece of every policy. This professional plan describes the teaching, research and service goals to be pursued and is a benchmark in evaluating achievement and performance on an annual basis as well as during the post-tenure review cycle. This plan changes and evolves as personal needs or circumstance change and as departmental mission changes.

I. When appropriate in summative situations, articulate explicit consequences so that all allowable outcomes are understood and so that appropriate institutional systems are in place to support faculty in the process. These consequences and support systems include:

- Rewards/Recognition Options
- Development Opportunities
- Improvement Plans, if deficiencies are noted
- Allowable Sanctions
- Appeal Processes and Due Process Protections

J. Mandate clear accountability for policy implementation and auditing of results. This accountability function normally should reside within the Academic Affairs Division and include some type of annual progress reporting.

5) Problems

Problems frequently expected or actually reported include:

- High level of initial faculty resistance, which is partly a result of the fear that the review is intended to be a retenuring process or a veiled threat to destroy tenure. Institutions that include faculty governance groups in post-tenure review discussions early on report that this resistance can be greatly diminished and actually replaced by collaborative negotiations that thoughtfully and planfully shape the policy.

- Costs in terms of time and effort to carry out the process;

- Noted unevenness in the skills and interests of those entrusted to evaluate faculty and variation in application of performance criteria across an institution;

- Difficulty in determining what constitutes reasonableness in terms of an expected remediation plan, a timeline, and activities expected if improvement is warranted.

It should be noted, however, that in those institutions where the problems described above were identified, there continued to be satisfaction with the overall process and actions were planned to address the problems that emerged.

Great reservation has also been expressed about the negative affect of post-tenure review on certain academic traditions. Such reservations were not borne out in our preliminary research. Of the nine campuses we profiled, we did not, for example, find evidence that post-tenure review practices either destroyed collegial relationships, threatened academic freedom or inhibited the pursuit of controversial areas of inquiry. A word of caution is necessary, however. These findings must be considered preliminary and as such need to stand the test of time and the rigor of further data collection in order to be conclusive.

6) Effectiveness

Regrettably, much remains unknown about the effectiveness of current policies in achieving their stated institutional purpose. Most reporting hinges on anecdotal or overall impressions rather that on empirical data. Published campus experiences are few.

We *can* look to the Hawaii experience which shows that out of 618 initial reviews on the Manoa campus, only 72 (12%) were labeled as substandard performers. Of this number, twenty chose retirement and the remaining fifty-two developed remediation plans; forty seven made satisfactory progress and five made minimal progress. The Hawaii experience also suggests that the number of grant applications rose; retirement rate rose initially and central funds established to support development were rarely tapped.[12]

We can also look at reported discussions with campus representatives from Hawaii, the California State University System, Universities of Maine, Montana and Oregon which, when taken together, appeared to indicate that post-tenure review was a "qualified success." Some talked about changes brought about by post-tenure review such as improvements in teaching, research publications and grant submissions that probably would not have been made had they not been encouraged to do so by their colleagues or chair. Others openly discussed the seemingly "significant" impact on early retirement. Very few mentioned dismissal for cause resulting from post-tenure review.[13]

7) Resource Deployment

While research and practice strongly suggest that post-tenure reviews must include a strong faculty development component and be linked to attendant resources for travel, research assistance, released time and the like, the issue of adequate resources has raised some concerns because of the fiscal realities facing many campuses.

Experiences in Hawaii, Wisconsin, Oregon and Maine confirm that shared partnership for professional growth did not require unreasonable amounts of funds. While we don't know exactly what the price tag is, we do know from several research studies (Harris 1996); [14] (Wesson and Johnson 1989) [15] that the lack of resources for funding faculty development is one of the two most commonly expressed problems in post-tenure review expressed by faculty.

NAGGING QUESTIONS

[The information reported here draws heavily on data collected and reported in: Licata, Christine M. and Joseph C. Morreale, Post-Tenure Review: Policies, Practices and Precautions. Washington, DC: AAHE, March 1997.]

Many nagging questions remain regarding both the long-term impact and the opportunity costs connected to post-tenure review. When answered, these questions will help inform campuses about future direction and refinement. These questions include:

- Whether post-tenure reviews will improve quality in teaching, research, and service?

- Will reviews deliver on the promise of promoting faculty development, departmental collaboration in advancing the goals of the local unit, and long-term individual professional goals?

- Whether institutions will take seriously the fact that people age differently and consequently use this review as an opportunity to foster differentiated workloads; creative transition planning for later career faculty, and nourishment for the professional vitality of the senior ranks?

- Will reviews impact the role of chairs in terms of skills required and terms of appointment?

- Will the presence of these reviews affect the rigor of pre-tenure evaluation?

- Will these reviews be a catalyst for a similar type of review for administrators?

- Whether these reviews can tighten the paper trail and actually lead to dismissal for cause?

- Will these reviews forestall future external interference?

- Whether the benefits outweigh the costs?

FUTURE DIRECTIONS

As one reviews the current tenor of the national conversation on post-tenure review, certain future directions and outcomes are worth consideration. Seven predictions seem plausible:

1) All state institutions will have post-tenure review practices in place before the year 2005. Some will choose to call it an enhanced review; others, periodic review; and still others will select a variation on this same theme. The current controversy over consequential versus developmental reviews will subside and out of this debate, we will have made progress clarifying what processes are needed to foster faculty development and what processes are necessary to maintain compliance with the tenure covenant. We will also be in a better position to compare and to contrast the outcomes that emerge from the three extant review models.

2) Most private institutions will follow suit and adopt, in principle, the formative aspects of post-tenure review.

3) Early results in terms of outcomes will disappoint some state legislatures, citizen regents and the public because there will be no appreciable rise in terminations of tenured faculty. If, however, we use this program as an opportunity to educate our policy makers about academic culture and attendant governance structures, a greater understanding about faculty work life and tenure will be achieved as will recognition that if these reviews work in a *developmental* way, the need for termination for cause would be expected to be very low.

4) Significant emphasis on opportunities for professional development will take center stage on campuses. Renewed efforts and resources for faculty development will emerge that will not require a large investment of funds.

5) Post-tenure review will have a strong positive effect on tightening up the all-too-often pro-forma annual review process. As a result of national post-tenure review discussions, attention will be focused on good evaluation principles and the need for retrospective and prospective continuity from one year to the next. It is plausible that experience will help us resolve the debate as to whether it is appropriate to mix aspects of formative and summative models into one process. Annual reviews of substance will meet with more acceptance as a credible form of post-tenure review, and these reviews will all include thoughtful prospective professional development planning and greater attention and vigilance to following established processes for handling egregious cases of chronic nonperformance.

6) Post-tenure review will have served as a means to an end for institutions willing to commit the time and energy to make it work—time and energy focused on:

- formative efforts to stimulate professional development and gently exert peer pressure to do so;
- energy aimed to use post-tenure review as a way to bring credibility to the need to alter one's work goals and activities over the seasons of one's entire career;
- a way to help make the institution more nimble in responding to environmental changes spawned by associated program and accreditation reviews, as well as pedagogical and disciplinary shifts, many of which will be wrought by advances in technology.

7) In the end though, we may be unsuccessful in developing a good cost-benefit analysis model for post-tenure review, however, we will not abandon these practices casually because the cost of doing so in terms of public reaction will deter us. At the same time, we will systematically track outcomes and while the results will not indicate revolutionary change for "most," they will point to significant change for a "few" and steady progress for "many."

WILL POST-TENURE REVIEW REALLY MAKE A DIFFERENCE?

The answer is simple. We do not know at this time. AAHE's New Pathways II Project will focus energy over the next three years on this question. I invite you to become a part of this national dialogue and welcome your thoughts and perspectives as we enlarge and expand the conversation. My prediction is that the value of these reviews will best be measured on an individual normative basis and that, in doing so, the impact question can be answered in the same way today as it will be answered ten years from now. An answer found in an old sea tale:

> As dawn broke over the beach,
> The old man asked the youth why he was flinging starfish into the sea.
> The answer was they'd die if left in the sun.
> "But the beach goes for miles and there are millions of them,"
> he muttered.
> "What difference is it going to make?"
> The young man looked at the starfish and said, as he threw it to safety,
> "It makes a difference to this one."
>
> Author unknown

And an answer found in the questioning exchange between Cassius and Brutus:

> "Tell me, good Brutus, can you see your face?
> No, Cassius, for the eye sees not itself but by reflection by some other things."
>
> *Julius Caesar*, Act 1, Scene 2:57

Faculty need reflective opportunities. And post-tenure review may well be the lens that encourages this type of focus.

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POST-TENURE REVIEW

B. A RESPONSE TO POST TENURE REVIEW: QUESTIONS & PERSPECTIVES

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INTRODUCTION

Session after session, at conferences on higher education, are being held on post tenure review, "new" faculty development programs, alternatives to tenure, and other related topics. State legislatures are talking about these issues, as are administrators, boards, faculty members, and members of higher education associations.

While it is clear that the environment for higher education has changed and continues to change, not all of the "new solutions" that are being presented have been developed in a careful, rigorous manner. Rather, more like corporate management fads, these "new ideas" are being touted as solutions long before we have assessed whether they are what is needed. In fact, the momentum which has built behind post-tenure review as the solution to a whole host of academic "evils" feels, at times, more like that coming from a revival meeting rather than from a serious review of the situation. On the surface, post-tenure review is neither new nor particularly worrisome when treated solely as a developmental process. What is, however, of serious concern to many of us in the academic community, is post-tenure review coupled with an underlying threat to the system of tenure and academic freedom, all under the guise of "professional accountability."

The discussion of post-tenure review (PTR) would benefit from careful examination, and my job in these remarks is to slow down the momentum behind PTR enough for us to look at its justification, to discuss some of what we know about the limitations of a system of PTR based upon the study of performance management systems in general, and then to outline the process the AAUP suggests that interested institutions and faculties take, should they be exploring or evaluating the investment of resources in a post-tenure review system.

WHAT'S WRONG WITH THE CURRENT DISCUSSION OF POST-TENURE REVIEW?

In presentations in which post-tenure review is discussed, its value is frequently described, in part, as being a response to the "environmental pressures" mentioned earlier. On the list of these pressures are items such as legislative initiatives precipitated by misperceptions of the academic enterprise, faculty accountability, and public hostility towards the notion of tenure (job protection for faculty, while most workers do not have it.) Now, no one will deny that such pressures exist on our institutions of higher education. However, what is not at all clear is that PTR is an appropriate response.

It worries me that members of the academic community are proposing to add a system of review to our already reviewed faculty, in order to deal, it would seem, with a misperception. If we are dealing with a misperception, than rather than invent a new system, let us deal with the misperception and explain ourselves to the public. Is it "spin" we are after, or substance? Perhaps we need to communicate to the public and to our state legislatures what systems of review we already have in place on most campuses. We can discuss our systems of annuals reviews, the intensity of tenure and promotion reviews (what other workers go through this process?), the reviews done on individuals' work by journals, granting agencies, etc., and merit pay reviews. I am concerned that some proponents of post-tenure review have not stopped long enough to make sure that their efforts are addressing the real problem.

The AAHE New Pathways II proposed research on post-tenure review has been described as a research program that will answer the question "are systems of post-tenure review effective?" While this certainly appears to be a valuable research endeavor, it does bring to mind other concerns: have we asked the necessary preliminary questions? It seems to me that we have not yet found the answer to an important first, or at least contemporaneous question. "Is another system of faculty performance evaluation actually needed?" If we don't know, for example how effective our current systems of review are, then how do we know that a new system is needed, and how do we even begin to measure PTR effectiveness without the research control provided by knowledge of the effectiveness of our current systems? The point here is that our research agenda is a bit out of order.

One other issue that frequently comes to mind as I listen to some PTR proponents is that on the one hand, they are assuming a lack of effectiveness of current systems of accountability, while on the other, they are recommending a system that is most often built upon the current systems. Many PTR systems use the current annual reports as the base of a three or four year review. While a longer time frame for evaluation makes particular sense for faculty, this system is still built upon the same information and it assumes that those in charge of implementing annual reviews will somehow be more effective at implementing the post-tenure review system. Quite frankly, a more complex system design change is unlikely to result in a more effective review process, all by itself.

So let me summarize at this point by noting that we seem to be moving on to a "new" solution without understanding the effectiveness of the review systems we already have in place, and that further, we appear not to have carefully matched the current solution to the "right" problem. This has real implications for the use of scarce faculty and administrative resources as we face the many demands on us all in today's world of higher education

WHAT WE KNOW ABOUT PERFORMANCE EVALUATION

In this section, I would like to briefly review some of what we already know about post-tenure review, based upon the literature on performance management systems. I have included this information because it is helpful, I believe, in assessing the remarks of PTR proponents, as well as the guidelines provided by the AAUP. It also makes sense to rely upon research already accomplished, when it is available to us. Below is a list of conclusions drawn from performance management literature and applied to post-tenure review.

- As post-tenure review is most frequently described, it is a system of performance evaluation.

- Any evaluation system must be designed in a way so that the parties that evaluate, and are evaluated, accept it as a useful, fair, and equitable system, in order for it to be effective.

- When an evaluation system is designed, its purpose/s (administrative, judgmental, and/or developmental) must be decided upon, with some knowledge of what outcomes are desired and what outcomes are likely to be obtained (systems with a double purpose -judgmental or administrative *and* developmental are generally less effective than a single purpose system.)

- An evaluation system must be designed to fit the culture of the organization in which it will be used. (In a culture of professionalism and shared governance, faculty must help design the system.)

- Those who evaluate others must understand and observe the work of those to be evaluated. Additionally, they must be trained so that they understand how evaluation errors are made (halo effect, attribution, etc.) and can be avoided, and so that they understand how feedback must be given in order to effect changes in performance. This takes time, money and commitment.

- The use of the evaluation system must be monitored to assure that evaluations are completed appropriately, that associated actions are taken (development - judgment) based upon the results of the evaluations, and that they system is having the effects desired (and not undesirable side effects). Not only this, but the equity across evaluators must be examined and maintained if these evaluations are used for judgmental or administrative purposes.

Implementing and designing performance management systems takes real time and real dollars, as well as a continuing commitment to its use. Evaluation systems are complex systems and therefore have a complex set of results. However, a lot is already known about how to design such systems. PTR is not a "new" concept as much as it is a hybrid.

THE AAUP REPORT ON POST-TENURE REVIEW

This report has been approved by a Committee A and with a few changes from what was published in *Academe* it will be considered by AAUP's National Council in the summer of 1998.

The AAUP's current policy on post tenure review was adopted in 1983. The statement is brief:

> The Association believes that periodic formal institutional evaluation of each post-probationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time, but also in dampening of creativity and collegial relationships, and would threaten academic freedom.

The statement goes on to remind the reader that no system of evaluation should be used to weaken academic freedom and tenure, and that procedures for disciplinary sanctions already exist in the *1940 Statement of Principles on Academic Freedom and Tenure* and the *1958 Statement on Procedural Standards in Faculty Dismissal Proceedings*.

Committee A, in approving the recent report for publication and discussion, has reaffirmed this position, but added substantial discussion of standards to be used if a system of post tenure review is in place or is being considered. It is reality that legislatures, governing boards, and university administrators have in fact mandated the development of post tenure review systems. It is Committee A's belief that AAUP members deserve some help whether they find themselves in the position of having to respond to such a mandate, or of participating in a collegial design process, or in working against the adoption of a PTR system. The report provides background on the current pressures for post-tenure review, lays out pros and cons in a sort of dialogue, cautions about risks to academic freedom, innovative teaching, or intrusive review procedures, and, importantly, provides practical guidelines and standards for faculty who may be considering or already implementing post-tenure review at their institutions, or has already been noted.

The *Report on Post-Tenure Review* also addresses the potential benefits of developmental evaluations of tenured faculty when they are accompanied by substantial institutional dollars, safeguards for academic freedom and due process rights, and faculty involvement in their design and process. If done properly and supported by incentives, such developmental reviews can be a means for constructive self-reflection and revitalization, can work to ensure collegial responsibility for evaluation, can document and reward accomplishment as well as provide assistance to those who may be under-performing, provide opportunities to improve teaching, foster respect, and strengthen institutions overall. These results are more likely to occur when the review systems take into consideration 1) flexibility of expectations at different stages of faculty careers; 2) the institution's mission; and 3) necessary safeguards for due process, academic freedom, and equity.

There are 4 principles that guided the development of the AAUP report:

1) Post-tenure review ought to be aimed not at accountability and efficiency, but at faculty development.

2) Post-tenure review must be developed and carried out by faculty.

3) Post-tenure review must not be a reevaluation of tenure, not must it be used to shift the burden of proof from an institution's administration (to show cause for dismissal) to the individual faculty member (to show cause why he or she should be retained.)

4) Post-tenure review must be conducted according to standards that protect academic freedom and the quality of education.

The following are paraphrased versions of the *Report's* guidelines for considering the establishment of a system for the periodic review of faculty:

1) The appropriate source of an initiative for considering the establishment of a post-tenure review system is at the campus level, with faculty exercising the primary responsibility for faculty status, therefore leading the exploration and design processes.

2) Any discussion of the evaluation of tenured faculty should utilize procedures that already are in place for just that purpose (e.g., merit reviews, annual reports, promotion reviews, etc.)

3) If the precipitating factor in adopting post-tenure review is to use it as a route to dismissal, then alternatively, the institution should

adopt procedural standards for dismissal for cause - as set forth in the existing AAUP policy statements.

4) As with shared governance systems, the AAUP has presented underlying premises that should guide the development of a system of post-tenure review, recognizing that each institution has unique characteristics of size, culture, mission, etc.

5) Any new system of post-tenure review should be set up on a trial basis, with a commitment to period evaluation of the system itself. Standards of effectiveness should include support of faculty development, response to faculty performance problems, time and cost of the review efforts, and the degree to which it is cordoned off from the disciplinary procedures and sanctions.

FINAL COMMENTS

Whether one looks at post-tenure review from the perspective of administrator or faculty member, there are many reasons to be concerned about the rapid and less than thoughtful development and implementation of such systems. Core values such as equity, academic freedom, peer review, shared governance, collegiality, and due process must be protected in any such system. Additionally, administrators and those pressing for post-tenure review must be made aware, if they are not already, of the demands of an effective developmental performance review system. If these demands of time, process, resources, and follow-through are not met, then even the best of systems on paper will not have a beneficial impact - and in fact could have quite negative effects. Those adopting PTR must also come to terms with the limitations of any new system. If currently, for example, department heads in your institution are not taking action regarding faculty who have repeated difficulties in the classroom, developing a *new* system of review will most likely not solve the problem, where as, training department heads in how to handle these situations might well. (We must match the problem with the solution.)

If a system is judgmental and not developmental, then it duplicates processes already in place (promotion, merit pay, dismissal procedures for cause, etc.). From a management perspective, this is inefficient. From the perspective of a faculty member, it can look as if the system is designed to carry out procedures to remove those not in the good graces of the administration. And from the perspective of the administration, such a system is bound to cause problems such as grievances, increasing the faculty-administration gulf, and eroding a collegial system that protects academic freedom.

I conclude with a statement of the questions I believe we still need to ask-and to answer:

1) Do we need a system of post-tenure review in order to respond to the misperceptions of the public and our legislators and regents—or do we need an educational campaign to change these misperceptions? Or do we need both?

2) Do we need a system of post-tenure review to deal with under-performing faculty, or do systems we already have access to provide us with avenues for change if we fix them and use them appropriately? Do we need a system of post-tenure review in order to provide faculty with developmental opportunities or do we already have programs and systems that do this? Do we need a system of post-tenure review to reward faculty for good performance, or do we already have such systems in place?

3) At those institutions that have already adopted post-tenure review, what results have been seen that are additive *beyond* those experienced using other review systems? What are the unexpected results that may have occurred; specifically, has academic freedom been protected?

4) Finally, what would a cost-benefit analysis tell us? That is, given the time and resources that go into designing, implementing, and monitoring an *effective* performance evaluation/management system, are the *associated benefits* greater than the sum of the costs, for the institution?

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III. NEW MODELS FOR INSTITUTIONS OF HIGHER EDUCATION

A. An Observation on New Models for Institutions of Higher Education

B. The University of Phoenix Model of Adult Learning

C. Labor/Management Cooperation: The Saturn Model

NEW MODELS FOR INSTITUTIONS OF HIGHER EDUCATION

A. AN OBSERVATION ON NEW MODELS FOR INSTITUTIONS OF HIGHER EDUCATION

Gordon K. Davies, President
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It is a pleasure to be here this afternoon and a particular pleasure to have been invited back. Several times over the past few years I have been privileged to provide comic relief at this annual conference as the head of a state higher education board in Virginia, a right-to-work state. My persona was that of a quaint, necessary evil.

Now I am privileged to be at the august Teachers College, where I am trying to figure out why there is an ugly ditch between scholarly writing about higher education policy and finance, and what I have done and seen done over more than two decades of practice.

It is morally less confusing to be a quaint, necessary evil.

My thesis this afternoon is simple and has two parts. First, the genius of American higher education is its ever-increasing inclusiveness, its intense and often untidy commitment to provide advanced education to every woman or man who wants and can benefit from it.

Second, American higher education as we have known it is in trouble. All is not well in the higher education systems of our 50 states. Higher education is beset by loss of high priority, despite some rhetoric to the contrary. This has resulted in declining state and local financial support, and increases in tuition prices causing outrage among those who have to pay the cash or borrow it.

And we are dealing with the emergence of a higher education marketplace in which new providers of services compete with traditional colleges and universities for enrollments.

Even the language is different: marketplace, providers, services - not to mention consumers and, horror of horrors, customers.

Fifteen million people are enrolled in American higher education. Regional colleges and universities, community colleges, and non-prestigious private institutions enroll about ten million of them. There will be ferocious competition in the new education marketplace for these ten million students. If traditional colleges and universities compete effectively, the market will increase and millions more will become potential consumers of advanced education. If they do not, state-supported systems of higher education all over America will lose market share and find themselves in desperate difficulty.

The new providers, whose number and size will increase rapidly in the next few years, use computing and communications technology to deliver some or most of their instruction. But while using technology attracts most of the attention, the new providers are most significant for two other reasons. First, they offer highly focused programs that are aimed at good jobs and professional advancement. And second, they are trying to measure their results in far more precise terms than traditional higher education - with its more diffuse aims - ever has done. They are offering clearly defined, competency based advanced education.

I think that new alliances will be formed - probably already are being formed to link intellectual resources (possibly major universities or just members of faculties functioning as independent contractors) with communications and technical resources, and with capital. The objective will be to offer easily accessible advanced education in the home, workplace, or local shopping mall at prices below those charged for on-campus programs. Universities themselves will participate in this movement by creating separate corporations for their extended learning activities.

These alliances will be able to keep their prices down because they will avoid the expenses of big physical plants, student services, athletic programs, and large, tenured faculties and staffs. And they will "cherry-pick" the curriculum, offering only the courses and programs that have the highest enrollments. One large community college district has determined that 50 percent of its credit hours are produced in only 25 courses. And it has been estimated that as many as one-third of the credit hours in typical baccalaureate institutions come from about as many courses. If we don't collaborate on these courses, the new providers will.

We shall see a major market for education that leads directly and immediately to employment, followed by additional continuing education that keeps workers skilled and knowledgeable. We have helped to make education the most important factor in determining who becomes economically self-sufficient and who does not. Now we have to recognize that most college students in America are concerned primarily with getting and keeping jobs.

I have enormous admiration for the University of Phoenix, which has helped awaken some of us from our dogmatic slumbers. But I suspect that even its creators will tell you that the future holds many new providers, some of which will have far greater access to capital and technical know-how than today's players. The future belongs to the agile.

The providers that succeed in the market will offer custom-designed products and consumer-friendly services. The few examples we have seen so far indicate that a significant number of students are willing to invest in custom-designed products from easily accessible vendors. If Levi-Strauss can produces custom-made jeans at about the same price as those bought off-the-shelf, surely entrepreneurial vendors of higher education can do the same with degrees such as the M.B.A. "Give us your detailed job history, academic transcripts, a skills inventory, and we'll design an M.B.A. exactly to fit you."

A market will still exist for traditional, residential higher education, but students will seek it at institutions that they perceive to be prestigious or distinctive in some way, such as the Ivy League or the most selective liberal arts colleges. Institutions that are less selective, with no special niche, will be at risk. They will compete directly with new providers for the 10 million of more students who are potential consumers of part-time, job-oriented advanced education. The endangered institutions, many of which are public, will need to be agile and creative. For instance, they may seek to serve the communities of which they are a part by augmenting the instructional services provided by large communications networks. Their faculties could play three important roles:

1. Talent scouts - surveying the resources available to find those best suited to the people of the region, the jobs they seek and lives they wish to lead;

2. Mentors - helping students plan their programs of study and integrate them into their lives;

3. Tutors - augmenting and enriching instruction received electronically. If that sounds oddly familiar, it is. It's Oxford or Cambridge. And I think it will be rich and fulfilling work.

Add to it the daunting task of figuring out how to help students learn at appropriate times in their lives how to be self-fulfilling individuals, good parents, and responsible members of communities - perhaps the objectives of what we call a liberal education - and the plates of creative and agile traditional institutions are very full indeed.

State and federal governments will have to figure out entirely new ways to fund institutions that function in this way, because the old enrollment-drive or degree-driven formulae won't work at all. That's one task.

But states also will have to get clear about whether their role is to protect their institutions or to provide the best possible array of educational opportunities to their citizens. For me, the choice is clear. Institutions, while important, are simply means to an end. They enable us to organize some particular kind of human activity. As the opportunities expand because of technological advances - be it the mass-produced printed book or the worldwide web - institutions of different kinds will emerge. I think that's what is happening today.

Adrienne Rich, in one of her 23 love poems, writes that:

> Whatever we do together is pure invention;
> The maps they gave us were out of date by years.

That's true of us here today. It's an exciting time, filled with promise. But we shall have to make it up as we go along.

NEW MODELS FOR INSTITUTIONS OF HIGHER EDUCATION

B. THE UNIVERSITY OF PHOENIX MODEL OF ADULT LEARNING

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INTRODUCTION

From its inception in 1976, the University of Phoenix (UOP) has employed a teaching/learning model designed to enable working adults to earn undergraduate and graduate degrees while continuing to meet their personal and professional responsibilities. The model is student-centered and service-oriented and focuses on learning outcomes as the primary indicator of achievement. The focus on student service begins with access to facilities and support systems. UOP campuses and learning centers are located near students' homes and/or workplaces. University facilities are leased to allow for flexibility in responding to changes in the size of the student body or to changing conditions within a given community. Students at UOP are offered one-time registration for their entire degree programs and take one course at a time in an intensive, five- or six-week format. Student services are available in the evening and are accessible in-person, or via mail or phone. Further, students may access the curriculum through distance learning modes, as well as the classroom, and are provided access to a virtual library.

The curriculum is outcomes-based, both for individual courses and for programs. The outcomes are driven by the faculty, who serve as content experts for curriculum development. Outcomes are also influenced by input from students' employers and the students themselves. In addition to curricular outcomes related to content knowledge and skills, basic workplace competencies, as identified by student employers, are built into the program of study. The case study learning approach is utilized in the professional curricula to simulate the work environment. Curriculum is standardized to ensure uniformity throughout the geographically distributed campus system.

The learning atmosphere of the UOP model is collaborative in nature. The method of instruction by faculty is facilitation-, rather than lecture-based. Faculty serve as content experts, but students are expected to be active participants in the learning process, and the experience of students is considered relevant and important to classroom activities. In addition to class attendance, students meet weekly as part of a study group to work collaboratively on group assignments. These study groups also function as mutual problem solving and support mechanisms in which the responsibility for learning is shared among the members of the group. The study group element of the model fosters a team orientation and develops group skills necessary in the work environment.

The faculty are working professionals with advanced academic credentials. In addition to meeting standards for academic preparation, faculty must have relevant work experience in order to gain approval to teach specific courses. Regular reviews of faculty qualifications are conducted to ensure currency of work experience and professional and academic development. The University employs more than 4600 practitioner faculty as facilitators and curriculum experts. These faculty also play a central role in academic governance.

The UOP teaching/learning model as developed by Dr. John Sperling has been validated through research on adult learning conducted by such notable scholars as Malcolm Knowles (1983) and David Kolb (1984). In addition, three studies conducted under the auspices of the College Board (Aslanian and Brickell 1980, 1988; Brickell 1995) confirm that this model addresses precisely those academic and individual needs that other institutions of higher education and adult learners themselves identify as high priorities, e.g., accessible student services, multiple delivery formats, convenient location.

THE UOP TEACHING/LEARNING MODEL

The University of Phoenix teaching/learning model is fundamentally different from traditional models in several ways. First and foremost, the mission of the University is exclusively to provide higher education opportunities to working adults. This means that UOP does not prepare novices to enter the workplace. Instead, it provides access to adult learners who are already employed and who seek to improve themselves through education. Perhaps the most salient difference in the UOP curriculum is the delivery format. Although it is true that other institutions of higher education offer programs with similar curricula and content, the UOP delivery mode is not replicated as an exclusive delivery mode by our sister institutions. UOP courses are intensive in nature, lasting five weeks at the undergraduate level, and six weeks at the graduate level. Classes meet once a week for four hours and are taken sequentially, one at a time. In addition to class attendance, which is mandatory, students are assigned to study groups in each course, which meet an additional minimum of four hours outside of the classroom. It is this format that distinguishes UOP's programs from those of its sister institutions and which explains the appeal of UOP for working adults.

The University of Phoenix curriculum is outcomes-based. Each course, and each program of study, is defined by standard outcomes that students should achieve. Following principles of adult higher education and adult learning principles, the University does not tie student assessment to hours spent in the classroom, but to student achievement. Naturally, such a system requires monitoring and benchmarking. For these purposes, on a regular basis UOP students take nationally normed examinations, e.g., the ETS Academic Profile, ETS Tasks in Critical Thinking, and the ETS Major Field Tests in Business for comparative purposes. In all instances, UOP students score at or above the national norms.

THE UOP FACULTY MODEL

The University of Phoenix faculty model is unique in that it consists primarily of practitioner faculty supported by a cadre of full-time faculty who are resident at each campus according to program and student needs. The University currently employs 141 full-time faculty and supports a cadre of more than 4,600-practitioner faculty. This model necessitates a redefinition of role of "adjunct" faculty that extends substantially beyond that found in traditional higher education. This redefinition begins with the practitioner faculty member's basic relationship to the University and extends to the role of practitioner faculty in the University's curriculum, faculty governance, and professional development. In all respects, University of Phoenix practitioner faculty far exceed the expectations associated with "adjunct" faculty, and in many cases they function in capacities equivalent to those of full-time faculty at other institutions.

The most salient difference between the UOP model and traditional adjunct faculty is the fact that UOP faculty have full-time employment in their areas of professional expertise. Their motivation for participation in the University community exceeds a need for part-time or supplementary employment. A recent survey conducted by the University of Phoenix's Southern California campus suggests that the most important motivation is enjoyment of teaching. Faculty tend to stay with the University for fairly long periods of time. Of our 4,600 faculty 25% have taught for the University for at least five years and 44% have taught for at least three years. In those campuses in existence for ten or more years, 25% of the faculty have taught for the University for ten or more years. This level of enthusiasm and loyalty was noted by the 1996 NCA visiting team.

The question of why faculty prefer to affiliate with the University of Phoenix is answered largely by the University's attitude toward the role of practitioner faculty, namely that they ARE the faculty of the University, not "adjuncts" to the faculty. Faculty at the University of Phoenix become members of the University community and are afforded the rights and privileges of that membership, as well as the responsibilities. The faculty of the University of Phoenix are expected to know institutional policies, procedures and processes in order to assist students. All faculty at the University undergo a rigorous screening process and subsequent training to afford them the opportunity to become acquainted with and well-versed in University rules, policies, procedures and processes. The process includes a content interview and an interactive exercise designed to assess applicants' abilities to facilitate and engage in dialog with others. A second quality screen is conducted by the Academic Deans, who review the applicants' files for compliance with specific written criteria governing academic and professional credentials. Criteria have been designed and published for each course; baseline criteria are a master's degree and a minimum of five years of professional experience in the field in which the applicant wishes to teach. (The criteria for General Education faculty tend to focus more exclusively on the strength of academic experience.) Once an applicant has been approved by a Dean to teach specific courses, he/she is appointed to the faculty and required to complete a mentoring assignment with an experienced faculty member. Included in the training and mentoring program are the following training modules:

Facilitation
Small Group Process
Grading and Evaluation
Internet
Human Equity
Evaluating Student Writing
Adult Learning Theory

In addition, the faculty receive a Faculty Handbook, updated annually, which includes all salient policies, procedures and expectations.

With regard to curriculum and program goals, the full-time faculty of the University are responsible for the curriculum development and review and also provide leadership in faculty and academic governance. Each Academic Dean has an Assistant Department Chair at each campus where the program is offered. Each Assistant Department Chair works with local practitioner faculty to facilitate communication and decision making about program curriculum among the faculty. This structure ensures that the practitioner teaching faculty are actively engaged in the curriculum review and academic governance.

Each academic area has a Curriculum Committee which operates under the leadership of the Dean. Deans are full-time faculty who have responsibility for program design and curriculum development, final approval of faculty appointments to teach specific courses, and accountability for overall program quality and effectiveness. Deans are linked to the practitioner faculty through Assistant Department Chairs at each of the main campuses.

The Assistant Department Chairs also serve as members of the area Curriculum Committees. Curriculum Committees meet at least twice annually to review curricular and academic policy issues pertaining to the program area. A critical part of the Committees' responsibility is identifying and communicating faculty concerns regarding curricular issues. The area Curriculum Committee is also the forum for coordinating faculty input received from the numerous campus locations. The work of the Committee is based on a Master Curriculum Agenda developed jointly with the Dean.

In addition to the Assistant Department Chairs at each campus there are Faculty Curriculum Chairs (FCCs) who are practitioner faculty selected by their peers and the campus Director of Academic Affairs to lead Content Area

Subcommittees. These Subcommittees are defined by groupings of courses in related content areas. Faculty are assigned to subcommittees according to their primary teaching focus and academic/experiential backgrounds. Faculty meet at least twice a year in subcommittees to discuss academic issues and to make recommendations for changes in curriculum. Recommendations are forwarded through the Campus Assistant Department Chairs and discussed by the area Curriculum Committees.

Given the University's geographic diversity, an additional feature of the academic governance system is the Campus Academic Council. Campus Councils meet a minimum of twice a year to identify issues that are unique to the local campus, to share ideas for instructional and program improvements, and when appropriate, to make non-curriculum academic policy recommendations to the University Academic Council or Academic Cabinet. Campus Councils are advisory bodies to the Academic Cabinet on academic non-curriculum issues and have no policy-making authority. The Campus Academic Council is composed of the Assistant Department Chairs for each program offered at that campus, the campus Director of Academic Affairs, and the campus Vice President/Director. The meetings are co-chaired by the Director of Academic Affairs and an Assistant Department Chair. The Assistant Department Chair, who is selected as co-chair of the Campus Academic Council, also represents the campus as a member of the University Academic Cabinet, discussed earlier.

There is a sound pedagogical rationale for a practitioner faculty in an adult-centered institution. The adult students bring a wealth of professional experience to the classroom and are eager to share that experience with their fellow students and the instructor. In order for the instructors to have credibility with these students, they must be doing daily what they are discussing in the classroom. There are very few UOP classes in which there is not at least one student who is as professionally competent as the instructor. Furthermore, because the instructors are grounded in the world of work, they bring current practices and knowledge to the classroom and, as the curriculum requires, expect the students to apply those practices and use that knowledge in their own work. The transfer of knowledge from classroom to the larger world has historically been a major problem for higher education. We believe that a practitioner faculty, working with UOP's teaching/learning system, brings a very effective solution to the transfer of knowledge problem.

Arguably, the rationale for employing full-time faculty is to ensure academic oversight, faculty involvement in curriculum development and program review, as well as commitment to the mission of the institution. However, the University believes that a body of full-time faculty is not the only way to ensure consistency of academic review and oversight. In fact, UOP believes that it has demonstrated, and will continue to demonstrate that the institution is effectively managed both financially and academically, and that it can continue to grow without disproportionate increases in full-time faculty. The rationale for this position can be found in the University's teaching/learning model and its unique target population of students.

THE UOP LIBRARY

The University is home to an extensive state-of-the-art electronic library called the Learning Resource Center (LRC). The LRC supports the University's educational mission of providing higher education programs to working adult students. Additionally, LRC services support the specific learning outcomes designated in the University's curriculum. The LRC accomplishes its mission and supports patrons by:

- Providing research and reference services of the highest quality and integrity.
- Providing access to services 24 hours a day, 7 days a week.
- Providing superior customer service that is cost effective, time efficient, and convenient.
- Providing library holdings and database collections of the finest academic quality that cross all disciplines, degree programs, and education offerings provided by the University.

Two levels of library services are provided by the LRC: Assisted, completed by an LRC Representative and Unassisted, completed by the patron. Both levels provide complete bibliographic searches on research topics, copies of articles cited in bibliographic searches, and source information on local libraries.

The LRC performs mediated [assisted] searches for approximately 700 students every month. In addition, the LRC delivers over 1,000 journal articles each month. LRC patrons perform approximately 20,000 to 30,000 non-mediated [unassisted] searches as well as print approximately 20,000 articles monthly from the Online Collection. These figures reveal the extent to which the LRC's integrated approach to information access and retrieval succeeds in accommodating the unique reference requirements of UOP students.

UOP students purchase extra reading material should they need a book as opposed to journal articles. Due to UOP's emphasis on currency, the level of requirement for traditional print material is extremely low and in most cases does not exist. However, UOP will negotiate local library agreements if local access to public/private libraries is limited. For example, the Los Angeles metropolitan area has an abundance of library facilities for community access. In the Albuquerque, New Mexico area, where community access to library facilities is extremely limited, UOP has a library agreement in place with the University of New Mexico that allows UOP students privileges. Students can acquire books through these negotiated library agreements rather than through interlibrary loans.

The LRC maintains a Web site featuring an Electronic Library that allows patrons to search vast databases and print full-text articles directly to their desktop.

End-user searching (as opposed to librarian-mediated searching) is offered through the Online Collection. The collection contains approximately 3,500 journals holding nearly 4,000,000 full-text articles. The collection is updated daily. Also included are numerous links to Web sites all over the world that cite related information and provide access to valuable sources, such as electronic journal indexes, electronically published magazines, and electronic books, guides, maps, and directories.

With Internet access and a standard Web interface, the electronic library is available from a student's PC at anytime from anyplace in the world. This initiative is indicative of the University's commitment to go beyond providing learning support "services" by actually providing students with the "tools" of modern inquiry.

ASSESSMENT

Student academic achievement and institutional effectiveness are measured through the Adult Learning Outcomes Assessment (ALOA) and the Academic Quality Management System (AQMS) Adult Learning Outcomes Assessment Project (ALOA).

The University of Phoenix ALOA project is one of the most comprehensive cognitive and personal assessments of working adults at any accredited college or university in the nation. The ALOA system consists of the following components: Cognitive and Affective Assessment, Research Project, Portfolio Assessment, Critical Thinking, Communication Skills Assessment, and External Validation.

COMPREHENSIVE ASSESSMENT OF COGNITIVE ACHIEVEMENT (COCA)

The assessment process begins at admission with a two- to three-hour objective cognitive test. Internally developed, validated, and normed, these instruments have been designed by University of Phoenix faculty for each degree program to reflect the institution's unique Mission and Purposes. A personalized report several pages long is mailed directly to the student that provides a baseline appraisal of his or her current level of knowledge in their major field of study. This profile provides his or her academic strengths and weaknesses, along with suggestions for putting the self-knowledge to good use. Additionally, he pre-assessment is used to verify the appropriate rigor of each academic program. Individual results are documented as part of a student's academic record at the University.

A similar assessment is administered when the student nears graduation. The post-assessment report permits students to see in specific terms where they place in relation to their peers, how much they have achieved in relation to their pre-matriculation capabilities, and where they now stand with respect to the core subject knowledge attendant to their degrees. The interpretations and recommendations in the post-assessment report focus on lifelong learning, including self-guided learning, learning in the workplace, and the value of cooperative learning. The assessment portfolio can be used with their current or future employer as testimony to their skills and abilities.

AFFECTIVE ASSESSMENT

The assessment of affective growth is concerned primarily with the value one places on newly acquired knowledge and skills. Studies of successful professionals show that they place a high value on certain attitudes and skills. Among these are commitment to teamwork and cooperation; effective oral and written communications; confidence and a sense of competence and critical thinking and evaluation skills. Learning objectives in these affective areas are a part of all University degree curricula. This project assesses the development and change of personal and professional values, attitudes, and self-reported behaviors known or believed to be relevant to success in professional disciplines.

COMMUNICATION SKILLS INVENTORY

Development of communication skills is a major curricular element in all of the University's educational programs. Students are expected to demonstrate these skills in virtually every course the University offers and faculty regularly evaluate performance in this area. The Communication Skills Inventory evaluates students' written, oral, and group communication skills. Students are asked to self-assess their communication skill levels at both the beginning and end of their academic programs. At the same time, a faculty member is asked to assess that same student's communication skills. This process allows comparison of student and faculty perceptions of skill levels and measurement of improvement in communication skills from the beginning to the completion of the program of study.

PORTFOLIO ASSESSMENT

Among alternatives to the standardized tests, inventories, and surveys used in the current ALOA system, the portfolio assessment's objective is to create a comprehensive portrait of each student's achievements, capabilities, and special skills through actual examples of the student's work. The portfolio process also provides a mechanism for accumulating evaluations and commentary from faculty assessors on the student's strengths, weaknesses, and general educational progress. For purposes of institutional assessment, the package may also include test results and other outcomes measures.

The Master of Counseling program has taken the lead in adopting portfolio assessment as an integral element in its program of study. Many professional skills critical to success in the counseling program have historically proven difficult to measure with a standardized question-and-response examination. Through the portfolio process the students' professional and personal development can be assessed across the curriculum in the form of case notes, counseling plans, test results, evaluations, reports and videotaped counseling sessions.

CRITICAL THINKING ASSESSMENT

The ability to think critically is another world of work requirement. An assessment of critical thinking skills occurs in a course at the beginning of the student's academic program and in a course at the end. The activity is not initially identified as a critical thinking assessment but merely another course activity. Faculty score this activity based on a common rubric. The purpose is to measure a student's ability to solve problems using critical skills of inquiry, analysis and communication. Additionally, a random sample of students is assessed using a nationally normed instrument to validate that interval assessments are measuring students' abilities to think critically.

ACADEMIC QUALITY MANAGEMENT SYSTEM (AQMS)

The University of Phoenix system for assessing and managing the quality of educational processes and providing feedback for continuous improvement of those processes is known as the Academic Quality Management System (AQMS). The AQMS consists of a group of instruments and measures designed to monitor the day-to-day educational systems involving student, faculty, curricular, and administrative services. Information from the AQMS is most often used formatively for assessing quality and compliance, performing interim program diagnoses, evaluating faculty adherence to program standards and practices, and making small-scale resource decisions.

AQMS COMPONENTS:

There are eleven major surveys that are administered on a continuous basis that provide valuable assessments which can be measured against the University's quality measures:

1. Registration Surveys
2. Student End-of-Course Surveys
3. Student Comment Analysis System
4. Faculty End-of-Course Surveys
5. Graduation Survey
6. Alumni Surveys
7. Comments to the Chair
8. Exit Surveys
9. Employer Surveys
10. Faculty Involvement
11. Internal Customer Service

In short, students and faculty have many checkpoints to insure that quality is maintained throughout their experience with the University of Phoenix.

This large family of continuous evaluation research systems produces numerous reports and analytical studies that inform and provide computerized decision support for all in the educational enterprise. Results from the various assessment activities are compiled in three annual assessment reports (i.e., Student Academic Achievement Reports, Faculty Performance Indicators and Campus Performance Indicators) that serve as working documents for use in academic planning, faculty support, curriculum revision and continuous quality improvement in all program areas. As one of the principle sources of the information used to improve the efficiency, effectiveness, and vitality of the University, students directly benefit from a meta-curriculum concerned with customer service and product quality management.

CONCLUSION

At a time when many institutions are revisiting the teaching/learning paradigm and refocusing on the student, and in particular the adult learner, the University of Phoenix model offers a perspective developed during its more than twenty years of experience. This unique approach includes new views of the role of faculty, student services, and student achievement. The key to the success of the model lies in providing higher education opportunities to a population whose access is otherwise limited or non-existent.

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NEW MODELS FOR INSTITUTIONS OF HIGHER EDUCATION

C. LABOR/MANAGEMENT COOPERATION: THE SATURN MODEL

Jack O'Toole, Senior Consultant
Saturn Consulting Services Group

Saturn – A different kind of company; a different kind of car! This is how our company and our product have been heralded for the last ten years. It was very easy to say those words in the beginning, we knew though, it was going to be much more difficult to actually deliver what they meant. Entering the small car market with a brand new product in 1990 was a major undertaking, given the fact that the Japanese had virtually locked up this market since the mid-1980's. We knew their strong points of quality, reliability, durability, performance and a fair value for price were going to be just the first hurdles we had to overcome. Getting their loyal customers just to try our car was going to be even more difficult, so breaking with tradition needed to be our rallying cry.

We found this great saying during the UAW/GM Saturn Study Center, "If you always do what you've always done, you will always get what you always got." This became the first of many paradigm shifts that we would have to embrace if we were to truly "leapfrog" these formidable competitors. This simple phrase helped us question every aspect of our massive undertaking as well as being our cohesive defense against the tremendous inertia of mediocrity that had overwhelmed our parent organizations, the International U.A.W. and General Motors. Those two behemoths, as well as most corporations and unions in North America, have clung to the premise that they can keep doing what they have always done, just re-name it, throw more money and people at it, and they will get different results. That my friends, is called clinical insanity. Every significant breakthrough in the history of the world has been a "break with" tradition. We, unlike them, realized that we were in a comfort zone. We had confused the edge of the rut we were in for the horizon. This behavior was not going to get us where we needed to go.

It was not going to be enough to just talk differently, we had to start behaving differently. We faced some of the greatest challenges in the history of the auto industry: (1) we had a brand new product, with no parts in existence – save a few nuts and bolts; (2) we were going to build this non-existent product on many processes that had never been used to mass-produce cars before; (3) we were building an entirely new manufacturing and assembly facility in which to do this; (4) we were hiring a whole new workforce – new to Saturn that is, but they would virtually all come from existing General Motors plants – 126 of them, in 44 different states; (5) we were bringing all these new team members into a new people system, where the union was a full and equal partner in all decision-making.; and (6) we were going to revolutionize the way a car was marketed.

We were going to have to think systematically. In any organization in the world, from a mom and pop shop in a garage, to General Motors, there are only three systems -- the technology system, the business system, and the people system. Within these three systems, there are only three resources we have available – the physical, the financial, and the human. Only the human can think, so this is where we would concentrate. To optimize this human resource was going to take a set of very disciplined strategies. We realized that technology was not the answer. It never had been. The real key would be how well we blended the people, technology, and business systems. the strategies we chose were five very simple ones. The first strategy was recruitment, the second became training, the third was teams, the fourth partnership, and last but not least, risk and reward.

Our first strategy was built on the premise that people are more motivated when they work at an organization at which they choose to work. Therefore we designed a recruitment and selection process that would allow us to opt out those we felt not suited, but more importantly, to allow people to opt out themselves anywhere in the process, without having any adverse consequences result from it. This process started with a seven page application, followed by a structured telephone interview, then an invitation to come to our organization for two days, during which the candidate would experience two assessment exercises, a structured team interview, and a thorough orientation to all the benefits, wages, risk and reward, etc., while their spouse was given a tour of the surrounding area.

Our second strategy was training. Organizational psychologist Abraham Maslow once said, "If the only tool you have is a hammer, every problem starts looking like a nail." If we wanted people to do new things and exhibit new behavior, we were going to have to give them new skills. Our study center research had shown us that during the mid to late eighties, great organizations were having their team members spend 1.5 percent of their working time in training. This was especially true of our competitors, so if we were going to truly leapfrog them in the marketplace, we knew we were going to have to triple what they were currently doing. That is how we set our target of 5 percent of every team members' working time being spent in training. This percentage equates to 92 hours per year. Not just initially, but for as long as they remained a Saturn team member. We deemed lifelong education so important that we made it part of our risk and reward program.

Our third strategy was teams. When we were circling the globe doing our research, we saw the most successful organizations in the world had built very high performance teams. Everyone in their organizations was a member of a team. We had also learned from ourselves during the study, having each been in a full-time team as well as in cross-functional teams, the power inherent in a "group" of brains working toward a common goal. This strategy played out would have everyone in Saturn on a team. No exceptions.

Our fourth strategy was building partnerships. This proved to be the wisest one we chose. The initial partnership was between GM and the UAW that really allowed Saturn to have a chance to succeed. In the ensuing years, however, the other partnerships that were developed proved to be of far greater importance. These included the partnership with our team members, our suppliers, our retailers, the government, and the media. Our partnership with our team members has proven over time to the most vital. We promised them that they would have a meaningful voice in all decisions that would affect them and through our structure – with union advisors at all decision-making levels – strategic, tactical, and operational, as well as self-managed teams in which they would work, we lived up to that promise. We promised them we would never lay them off, unless there were catastrophic circumstances and we have lived up to that promise. They promised us they would build the highest quality cars at the lowest possible cost and they have lived up to that promise.

With our suppliers, we vowed to build long-term relationships that would be to our mutual benefit. Most organizations call these critical partners – vendors, but we knew we could not initially, nor long-term, succeed without their total buy-in. That is why we have always referred to them as our supplier partners. They are involved fully and equally in all the decisions relating to their product or service, and they have responded with remarkable ideas that have made us and keep us successful. Our facility in Spring Hill, Tennessee is over a mile long and a half-mile wide, and yet every day 60 percent of our car parts come in by truck. They play a vital role in our success. With our retail partners we have also built a remarkable partnership. We realized that no matter how well we built our cars in Spring Hill, if our retailers turned off four out of five people who came in to purchase them we would all fail. In response to this realization, we designed into our franchise agreement the requirement that all of our retail partners' team members would be trained in Spring Hill, Tennessee by our team members, so that we were all in total alignment. In addition, we created a Customer Action Council – to be comprised of Saturn sales, service, and marketing leaders, UAW leaders, and six of our retail partners. This group would set all the requirements of operating our retail stores, make all marketing, sales, and service decisions and settle most of the operational disputes.

The relationship between the auto industry and government has historically been one of controlled antagonism. We knew we had to have a much better relationship with local, state, and federal officials is we were truly going to leapfrog our competitors, so our approach here was to start out fresh and build on our mutual concerns. With all three of these distinct entities we started our relationship by building mutual expectations. We openly discussed and agreed on how we would work with each other to really build trust, communication, and an environment of mutual success. Our final partnership was with one of the most powerful forces in America – the media. We approached this relationship with the same straightforward design as all of our other partnerships. We met with representatives of all forms of media, and built the same kind of no-nonsense accord. We will never lie to you; we will involve you up front – so that you will never have to call us and ask about rumors, if you will treat us the same way. This approach has led to the best relationship in America between an industry and the printed, electronic, and spoken word.

Our final strategy, risk and reward, was based on the premise that if you really want behavioral change to take place, you must look at how you have always compensated all of your team members, and understand if that approach was bringing people together toward common goals, or was it driving people apart through inherent distinctions. Going back to our Study Center research, we knew that some people are motivated by the chance of making more and some are motivated by the chance of making less. We designed our compensation system to respond to both. We also knew that when it comes to compensation, you must keep things simple. If people cannot figure out, with relative ease, how they are being rewarded monetarily, it will be de-motivational. Our compensation system was designed in three simple components: (1) base compensation, (2) risk pay, and (3) reward pay. Our base compensation was simplified by the fact that we made our entire workforce salaried. Some were represented by the union and those who were not, were non-represented.

Everyone was paid the same way – a base salary twice a month. In the bargaining unit, we designed two classifications – operating technician and trades technician. Those who were non-represented were in a hybrid of General Motors traditional salaried classifications and Saturn pay grades. The risk pay element was designed to eventually reach a 20 percent level, where everyone in Saturn would have this portion of their total compensation tied to mutually agreed to goals. To date the level achieved has been 12 percent. The risk portion goals are broken down in three parts: (1) training – 5 percent, (2) quality – 5 percent, and (3) team building 00 2 percent. This aggregate is held back from the bi-weekly pay. If the goals are achieved, it is paid out in a lump sum on the last paycheck of the month following the end of the quarter. The reward pay element by design, rewards everyone at Saturn with the exact same amount of compensation. This element started at $3,000 in 1993 and has grown to $12,500 in 1998. The goals for this element are three-fold: (1) quality, (2) schedule, and (3) profit. The pay schedule for the first two goals is quarterly like the risk portion, and the last element is paid out annually. Since 1993 this system has paid out over $32,000 per team member, the most proficient in the auto industry.

Crossing the globe, wherever I have spoken, people continually ask me what I consider the single most important element of our success at Saturn, and I quickly tell them – the establishment of our mission, philosophy, and values and the adherence to using them to guide all of our decisions.

We realized that if we wanted to change all of our team members habits, we had to address three elements. They are knowledge, skill, and attitude. Knowledge is knowing what to do, skill is knowing how to do it, and attitude is understanding why, so as an individual, I can choose to want to do it. The knowledge of what to do is an organizations' mission. The skill of how to achieve this mission is an organizations' philosophy. Most organizations stop there and wonder why they do not achieve remarkable success, and the answer is always that they did not get people to understand why. If you give a person a why, they can do any what or how. The attitude of why is an organizations' values. The success in making these work lies in the fact that they must be simple and concise, and everyone in the organization must be trained intently in them and their importance to the success of the endeavor. I believe we have done this better that 90 percent of the organizations in the world, because we included all of our partners in the education process, which includes our car owners. I also believe that we have succeeded by employing enabling strategies that support and reinforce the importance of these three key elements and have allowed us to utilize them in a more focused approach.

In the final analysis, this systematic approach really does work. It works because it is based on principles that are thousands of years old – principles as simple as doing what is right, doing your very best, and treating others like you want to be treated. Other principles include being committed, being trustworthy, and caring about your fellow team members – as simply other human beings in the same circumstances, with the same wishes and hopes.

IV. CONTRACTING OUT

A. Contracting Out of Government Services: Panacea or Poison?

CONTRACTING OUT

A. CONTRACTING OUT OF GOVERNMENT SERVICES: PANACEA OR POISON?

Robert Hebdon, Professor of Labor Relations
Cornell University

INTRODUCTION

Faced with financial pressures, governments throughout the industrialized world are seeking more efficient alternatives to current methods of service delivery. According to Savas (1987), "privatization is the act of reducing the role of government, or increasing the role of the private sector, in an activity or in the ownership of assets." Contracting out, the subject of this paper, is the most common form of privatization.

Contrary to the claims of the privatization industry, I contend that privatization is not a panacea for the financial ills of government. My case will be based on three essential points. First, the case study evidence of significant cost savings from contracting out is seriously flawed and ignores negative consequences. Second, my research in New York State indicates that local governments have rejected privatization as the preferred option for cost cutting. Finally, by ignoring history, contracting out would turn the clock back more than 30 years to a time when public sector workers received low pay and women and minorities were discriminated against in employment opportunities and conditions. In short, privatization in highly unionized states represents a return to a society where social injustice fostered protests, civil disobedience and strikes.

THE EVIDENCE ON CONTRACTING OUT

The evidence on cost savings from studies comparing municipal and subcontracted sanitation service is highly inconclusive (Hebdon 1995). Some studies do show some subcontracting cost savings, others indicate cost increases after subcontracting (i.e., municipal services could be provided cheaper by public employees), but most studies show no significant differences between the costs of private—contracted out services and those provided by municipal employees. Marsh (1991), in an extensive survey of privatization studies under Margaret Thatcher, found that savings were often short-lived. Private sector bidders would "low-ball" in order to win the contract only to raise costs in subsequent years.

Even where savings from contracting out were long term, no studies were found that adequately took into account the impact of subcontracting on the quality of services. Service quality is a critical element in the politics of privatization—it must be addressed if the privatization process is to survive the democratic process.

Another major deficiency of research on contracting out is selectivity bias. Local governments who have had a bad experience with contracting out are less likely to allow researchers access to their accounts to analyze financial data. Also, researchers often ignore those governments that have considered and rejected privatization as a viable option.

From the vast literature on privatization, here is a summary of some of the negative economic and non-economic effects of contracting out on services, employees, and the public (Hebdon 1994).

1. Economic
    - Competition and efficiency
        - Difficulty of monitoring and administrating contracts
        - Loss of accountability for public values and services
        - Loss of control, weakening of infrastructure
    - Corruption, bribery, kickbacks, bid-rigging, campaign donations, low-ball bids, contractor bankruptcy
        - Reduced quality of services
        - Higher costs—such as the higher taxes to pay for loss of pensions and benefits of public employees.
    - Impact on employees
        - Diminish the quality and public access to services
        - Reduce employee morale, productivity, turnover, and training.

2. Non-Economic
    - Legal considerations
        - Loss of government sovereignty (national security, environmental protection, etc.)
        - Weakness constitutional rights of individuals - (e.g., whistleblowing, ethical conduct - conflict of interest).
    - Social costs
        - Reduced equity, less accountability, lower citizen participation
        - Increased social unrest
        - Exploit part-time workers through low wages and benefits
        - Increase discrimination against minorities and women
    - Collective bargaining
        - Union busting
        - Increased conflict - more strikes, grievances, arbitrations.
    - factfindings
        - Abrogation of implicit contract between labor and public sector management.

NEW YORK STATE SURVEY OF TOWNS AND COUNTIES

In preparing the New York State survey instrument, I asked a local politician in a large upstate New York County, whether he thought of privatization as a last resort after all other possible actions have been tried. His answer was that privatization is the easy way out—a kind of "cop out" because it means transferring the problem to someone else. The more difficult solution and the best solution for the people, in his opinion, is one that protects existing services while preserving accountability to the political process. The hard solution but the best one, therefore, is to utilize existing resources more effectively.

In a recent survey of 900 towns and counties in New York (with Professor Mildred Warner of Cornell), five categories of the restructuring of government services were examined. They were: inter-municipal cooperation (e.g., mutual aid agreement), privatization (e.g., contracting out to private for-profit sector), reverse privatization (e.g., service taken back from the private sector), cessation of service (e.g., service ceases without transfer or contract to other sector), and entrepreneurial behavior (e.g., contracting municipal services to private sector clients). The main finding, as shown in table 1, is that government cooperation was by far the most popular form of restructuring. The 307 reported cases of cooperation representing more than 55 percent of all restructuring actions were more than twice the number of privatization actions at 154. In addition, there were 39 cases of reverse privatization, the most common element of which was the "contracting in" of privatized services to the public sector. Thus in a state with a Republican governor, local and county upstate politicians (mostly Republican) have responded to financial pressures by rejecting privatization and making public services more efficient.

Table 1
Incidence of Restructuring in Up-State New York Towns and Counties in the 1990's by Form of Restructuring

RESTRUCTURING	TOTAL	PERCENT
Inter-Municipal Cooperation	307	55.3
Privatization	154	27.7
Reverse Privatization	39	7.0
Government Entrepreneurship	32	5.8
Cessation of Service	23	4.2
TOTALS	555	100.0

(A) Main categories were: mutual aid agreements, joint production of services, contracting out to other government, and contracting in another government's service.

PUBLIC SECTOR BARGAINING IN NEW YORK STATE

Public employees in New York State have historically viewed contracting out/privatization as an employer tactic in their struggle for union recognition. For example, in 1946 when the American Federation of State County and Municipal Employees (AFSCME) sought recognition for municipal employees in Rochester, the city replied by dismissing 489 workers and making an "announcement by the city manager of his intent to contract for services with private firms" (Donovan 1990:2). This, in turn, led to a general strike involving over 30,000 private and public employees in Rochester.

Formal collective bargaining began in New York State with the passage of the Taylor Law in 1967 (See Donovan 1990). The law was passed against a background of considerable social unrest in America, characterized in New York State by a relatively high number of illegal public sector strikes. After a particularly costly transportation strike in New York City in 1966, the Governor legislature decided to reform the bargaining process. The pre-1967 law (Condon-Wadlin Act) was found to be deficient in at least two respects. First, the penalties for striking (all strikes were illegal) were so draconian that they could not be enforced. Second, the Condon-Wadlin Act did not adequately provide for a worker voice in employment matters. So the Taylor law was passed to guarantee industrial peace in the public sector by providing for enforceable penalties against workers and unions for all strikes and a formal collective bargaining process including union recognition and certification. Thus, formal collective bargaining began as a mechanism for avoiding costly public sector strikes.

Unstated in this implicit "social contract" between the State and its employees under the Taylor Law was the right, among others, of workers to advance their economic interests. The results of this social contract after almost 30 years of collective bargaining in New York State are: a relatively low number of strikes and social stability, a high level of unionization, and a measure of economic progress for unionized public sector workers.

In conclusion, privatization can be a disruptive, socially de-stabilizing, and potentially harmful method of cost saving. At its worst, privatization can actually increase costs, lower the quality of services, reduce public accountability, and marginalize citizen involvement in the democratic process. But the fiscal crisis has meant that the status quo is unacceptable. The rational solution is to seek creative alternatives to the way services are currently provided by improving the utilization of the existing workforce. The practical answer lies in fundamental reform of public sector work processes through dialogue, discussion, and negotiations.

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V. ETHICAL STANDARDS FOR COLLEGE FACULTY

A. Ethics and the University Professor

B. Academic Values

C. Ethics, Collective Bargaining and the Collective Agreement

D. Rights and Responsibilities of Faculty: UNESCO Adopts an International Statement

ETHICAL STANDARDS FOR COLLEGE FACULTY

A. ETHICS AND THE UNIVERSITY PROFESSOR[1]

Donald Savage
Retired Executive Director, CAUT

FORWORD

Questions about the ethics of university professors are as old as the universities. They have, however, become particularly pressing in North America in recent years partly because of the size and impersonality of modern universities that have rendered informal techniques ineffective. In addition, a number of highly publicized cases in the United States have not only attracted the media but also governmental attention. Furthermore, universities are concerned about questions of liability if they do nothing when an ethical problem arises or if they do not train their employees concerning the standards of the profession.

But what standards? How does one avoid falling into the clutches of the moral absolutists of the academic world who would return us to the Victorian age if they could? Or the spiteful who would like a method of torpedoing their colleagues. Or the ideologues? McCarthyism in the fifties did not arise simply out of the political context of the time. It played to some of the oldest vices of the human spirit – envy, maliciousness, spite, and resentment – and magnified them by providing the possibility of anonymous denunciation. So how does one chart a course between doing nothing, on the one hand, to avoid giving ground to the enemies of academic freedom and, on the other, riveting unfortunate and unworkable codes on the university community in an effort to avoid the tentacles of the politicians and the bureaucrats? If one acts, how does one avoid creating a bureaucratic monster?

This paper concerns two documents that have been created by the federal research granting agencies in Canada. One is on research integrity and fraud. The other, which is in progress, is on the ethics of research on human subjects. Here I have to declare an interest since, as the former Executive Director of CAUT, I was responsible for conducting an extensive dialogue with the research councils during the development of these two documents.

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THE CANADIAN APPROACH

Codes of ethics are very much a topic of discussion in Canada. The federal government recently endorsed a voluntary international code of ethics for Canadian businesses with interests abroad. This deals with bribery, human rights and workers' health and safety. Many business organizations such as the Canadian Institute of Chartered Accountants have urged Canadian companies to adopt their own codes of ethics. About 66% of the largest corporations do so. The Canadian Deposit Insurance Company requires such codes for its members.[2] Much of this business activity has been prompted by court cases in the United States where the existence of codes of ethics and evidence that the company ensured that employees knew about the code have lessened corporate responsibility in damage actions. The same thinking may well activate university boards of governors.

How might this apply to universities? For many years university researchers who were, for instance, medical doctors or professional engineers have been bound by the codes of ethics of those professions. In recent years professional codes have multiplied, making their application in universities complex and costly. Nevertheless they still do not cover all academics. Hence the search for a more global approach leading to the creating of overall codes of ethics for all academic staff in higher education. It is in this context that one must see the actions of the federal research agencies in Canada.

In the last decade the federal government through the three federal granting agencies (the Medical Research Council, the Natural Sciences and Engineering Research Council and the Social Sciences and Humanities Research Council) has taken the lead in defining more general codes of ethics for all university researchers. There have been two major federal initiatives in recent years. The first was the creation of a policy statement entitled, "Integrity in Research and Scholarship: a Tri-Council Policy Statement" which dealt with fraud and related research misconduct.[3] The debate on fraud and misconduct was accelerated by the findings of three inquiries at Concordia University in the aftermath of the Fabrikant murders in 1992[4] as well as a number of highly publicized cases in the United States. The consequence of this initiative is that virtually all Canadian universities have adopted policies dealing with fraud in university research. The discussion of the second is ongoing. It is an attempt to create a single code or guideline for all researchers engaged in research on human subjects.

The Canadian research councils have tried to create documents setting out the standards which should be part of the policies of any Canadian universities but leaving it to the individual institutions to set up local procedures in accordance with the federal norms. The code for research on human subjects will, for example, require all universities to have research ethics boards to bet research on human subjects. It also sets out detailed guidelines for the operations of these boards with the intention that they should be as independent as possible. The

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research councils themselves will not hear any appeal nor is any appeal procedure contemplated beyond the local university. The stick is that if universities do not put such policies into place along the lines suggested by the research councils, their academic staff may be cut off from federal grants. The argument of this paper is that this decentralized approach is sensible provided the federal standards are written in a rational manner, and provided university administrations and faculty associations negotiate the local procedures. Negotiated procedures are to be preferred over either complete self-regulation or administratively imposed codes. The pitfalls can be seen with the second of these Canadian documents, namely the standard for research on human subjects, which is to date deeply flawed because of a misguided attempt to write a single policy which would cover all areas of research from surgery to literary criticism and because of an initial failure to understand the importance of academic freedom in research, particularly controversial research inn the social sciences, humanities and the environmental sciences.

CAUT has been very much involved in the process, and has taken the stance of constructive critic of the two federal guidelines. Why has CAUT been interested to such an extent? These codes or guidelines have the potential to seriously affect the conduct of research that is, of course, a key activity of CAUT's members. That is reason enough to participate. It is, however, also CAUT's experience that the federal government has an unerring eye for choosing 20th century Savonarolas when it comes to drafting federal policy in this area. Or for those with a kind of benign wooly-minded liberalism bereft of any sense of due process or practicality. Both code-making exercises started with totally unworkable documents. CAUT has had, therefore, to engage in vigorous battle with the federal agencies about their proposed documents, and in both cases CAUT has succeeded in very substantially modifying the language.

THE IMPORTANCE OF LANGUAGE IN FEDERAL CODES

The development of codes dealing with fraud showed the importance of language. First one had to define fraud or scientific misconduct. In the view of CAUT fraud involved conscious deception, not sloppiness or intellectual confusion which might be judged negatively in other contexts but were not fraud. A favorite definition in the United States and copied by some in Canada included the words "or other serious deviation from accepted practices in proposing, carrying out, or reporting results from research." These words may, however, seriously impede genuine scientific originality and encroach on academic freedom since breakthroughs in research may well deviate from accepted practices. The Medical Research Council wanted to use this definition. It also wanted to focus on the stealing of thoughts and ideas as distinct from writings and findings, not realizing that this is notoriously hard to pinpoint and to prove. The Council, prompted by CAUT, eventually thought better of these approaches.

Similar problems have arisen with the document on research on human subjects. One major concern, particularly in the social sciences and the humanities, is the difficulty of writing one code to cover all research involving humans ranging from surgery to literary biography. These fears have been justified by the way in which the various drafts of the code inevitably followed the construct of biomedical codes of ethics, where the problems are serious and pressing, but whose conventions, rules and language are not really applicable to much social science and humanities research. The prescription, for instance, that research should not harm but should assist the patient along with the dictum about informed consent could, if applied mindlessly to research in political science, for example, paralyze research that was critical of the activities of its subjects.

BUT DO THEY LIVE IN THE REAL WORLD?

Particularly absurd was the original decision in the document on research on human subjects to include the dead as well as the living in the coverage of the REB. All would have to give their informed consent before the research could start. Who would give consent on behalf of Philip of Cadedon or the Pharaoh Rameses II? Eventually the dead were excluded.

The authors of the code also insisted that all research by anyone within the university community on any human subject, whether individuals or collectivities, should be reviewed by the university REB prior to the commencement of the research project. Collectivities meant any organized group including governments, private corporations and the like.

The decision to include collectivities showed that there was also an underlying theme of social control, even though many of the authors did not recognize it. Basically the leaders of collectivities would have to give informed consent on behalf of their collectivity for any research about them. No matter that this would entrench the authority of the ruling group and allow them a vehicle for suppressing research about their community or organization, which they did not like. One can see why a patient should give informed consent about a medical procedure that is part of a research program and why it is likely that many of them would do so. But can one se4e a major polluting company or a corrupt trade union giving their informed consent? If that informed consent is not forthcoming, does that mean that the research is closed down? Furthermore the article on collectivities applied to all governments domestic and foreign. Would Saddam Hussein have to give permission for any research on the government of Iraq?

CAUT argued that review by REBs of research on collectivities should be restricted to studies of local aboriginal societies (where the federal government has required this for some time) and to situations where the researcher has demonstrable power over the collectivity and thus a free choice on their part would be difficult. The latter is, in effect, a form of conflict of interest. It appears that the final policy statement will reflect this position.

The original documents would have included all undergraduate essays on humans or collectivities of humans. It apparently did not cross the mind of the authors that the vetting in advance of all undergraduate essays on human subjects or collectivities in a large university like the University of Toronto was simply an administrative absurdity. The inclusion of collectivities would mean that virtually every undergraduate political science, sociology and history essay, for example, would have to be vetted. Eventually the authors decided that departments could look after their own undergraduates.

LOCAL NEGOTIATIONS AND LOCAL STRUCTURES

The existence of the federal guidelines has meant that universities have had to put in place local procedures. CAUT recommended to faculty associations that they negotiate these procedures as part of the collective agreement and thereby ensure clear workable language in the articles in question. CAUT suggested model language in relation to research fraud (All CAUT policies and statements are on the CAUT web site: www.caut.ca). CAUT did so because the existence of good procedures ensures that the panic which many employers develop when faced with fraud cases or similar crises does not lead to instant decisions involving false conclusions. CAUT was also concerned about the choice of ill-considered language by local administrations. At McMaster University, for example, the university originally wanted to include in the definition of fraud the phrase "failure to respect university policies" without bothering to say what those policies were. Would it include violations of the parking policy? The Wilfrid Laurier administration originally wanted to ban "inappropriate behavior."5 The CAUT, of course, hoped that its language would become standard. This is a slow matter, but the CAUT definition of fraud and misconduct in academic research has been cited favorable by arbitrators in Alberta and in Manitoba,6 particularly CAUT's insistence that a finding of fraud requires proof of deliberate deceit. In addition CAUT has been concerned to ensure that any penalties are proportionate to the offence. All too often such cases are heard in an atmosphere of moral panic which can produce unreasonable penalties.

CAUT also suggested negotiated procedures because otherwise the employer can dictate the nature of the offence, the punishment and the procedures involved. In the area of fraud and misconduct in research some associations contented themselves with negotiating the procedures or simply applied the grievance and arbitration clauses of the collective agreement to the presidential policy. The difficulty with this latter approach is that the employer still defines the offence and the penalty and may do so in such sweeping moralistic language that the arbitrator would have to find for the employer even if the offence were trivial. A few associations such as the University of New Brunswick Faculty Association negotiated a complete article. Most associations, however, ignored the matter and allowed the administration or the senate to set up the procedures.[7] On a few occasions, such as at Concordia University in Montreal, CAUT entered the local fray along with the faculty association to do battle with the senate. This latter event produced a workable document but only after many versions came and went.

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One of the major problems with most of the codes proposed by presidents or senates is that they are far too cumbersome and frequently require what amounts to two complete hearings on the same charge. This arises because the administration tries to offload the original decision on whether or not to prosecute a case as well as the potential penalty involved to a faculty committee. In order for this to look fair and reasonable, such committees take on all the trappings of formal hearings. Then if the committee holds against a professor, he or she may grieve and arbitrate under the collective agreement, thus activating a second formal hearing. Basically CAUT takes the view that the collective agreement should define the offence, complaints should be made to the administration which should be empowered to investigate to decide whether there is actually a case, and, if so, the administration should apply disciplinary measures which can be grieved and arbitrated according to the contract.

Our experience is that the imposition of codes or rules from on high simply breeds contempt since they are frequently and correctly seen as devices to increase the power of the university academic bureaucracy.

Negotiation is, however, not the same thing as self-regulation. Negotiation brings two parties to the table - the researchers and the university administration - and both must agree to the results. Pure self-regulation as in the medical and legal professions has led to some skepticism in Canada. The negotiation model permits a check on the self-interest of the professionals but nevertheless brings their expertise to the table as equal partners.

CAUT is in the process of drafting a model article for local collective agreements on codes of ethics on research on human subjects. Since this proposed Code has generated far more controversy than the guidelines on integrity in research, it seems likely that more associations will try to negotiate articles in this area.

AREN'T ALL ETHICAL CODES A VIOLATION OF ACADEMIC FREEDOM?

There is, however, a minority within CAUT that argues that CAUT should simply oppose such policies or guidelines on principle because they are an unwarranted intrusion on the academic freedom of the members. Such critics are certainly correct when they point out that any regulations restrict the freedom of researchers. CAUT has, in effect, made two responses to this point of view. The rights of researchers are not absolute but are restricted by law and by regulation for the public good. The reason for this is self-evident, namely that in the course of the 20th century researchers have been willing participants in horrific crimes against humanity,[8] not to mention lesser but still disturbing experiments on humans such as those involving treatments performed by Dr. Ewen Cameron at the Allan Memorial Institute at McGill University.[9] There are also high profile cases involving fraud. In this latter situation, CAUT has itself stated that the claim for academic freedom carries with it "...the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge." In other words, the dishonest cannot claim the protection of academic freedom. In 1997, UNESCO adopted a statement on higher-education teaching personnel which sets out both the rights and the responsibilities of university and college teachers.[10] The moment, however, one accepts that some responsibilities are reasonable and that some regulation is necessary, the debate then changes from whether or not to have a policy on research ethics to one on determining the most rational form of that policy.

The second reason is a matter of practical politics. One could never win a battle for public support to oppose all regulation on fraud or on research on human subjects. Furthermore the publicity surrounding the recent federal report on the major scandal in Canada involving tainted blood has ensured that the federal government is very sensitive to these matters and intends to have codes in place by this spring.[11] There will, therefore, be guidelines or a code or codes of research on human subjects in Canada. If the researchers boycott the process, they will not stop it, and the regulations are likely to be that much more obnoxious, intrusive and bureaucratic than they might otherwise be.

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[1] This paper is a revised and updated version of one given at the meeting of the International Conference of University Faculty Organizations in Melbourne, Australia, February 1998.

[2] Mark Schwarts, "Heat's On to Get An Effective Code" in "Globe and Mail: Report on Business," Toronto, 27 Nov. 1997

[3] For a discussion, see Donald C. Savage, "Fraud and Misconduct in Academic Research and Scholarship," CAUT, Ottawa, Canada, February 1994. This is a revision of an earlier 1991 paper on the same subject. See also Donald C. Savage, "Research Ethics: The View of CAUT," paper given at the annual meeting of the Society for the Study of Practical Ethics, Brock University, Canada, May 1996.

[4] H.W. Arthurs (Chair), Roger A. Blais, and Jon Thompson, "Integrity in Scholarship: A Report to Concordia University," April 1994; John Scott Cowan, "Lessons from the Fabrikant File: A Report to the Board of Governors of Concordia University, May 1994;; Philip C. Levi, "Concordia University Special Audit Report on Specific Accounts of the Faculty of Engineering and Computer Science, July 1994. See also media release, Concordia University, "Condordia Releases Engineering Audit," n.d.; CAUT media release, "The Crisis at Concordia, 15 August 1994;" CAUT, "Response of the Canadian Association of University Teachers to the Cowan, Arthurs Reports & the Forensic Audit at Concordia University," and Donald C. Savage, "Financial Fraud: A Rush to Judgment," paper given at the annual meeting of the Society for the Study of Higher Education, Brock University, Canada, 1996. The federal Natural Sciences and Engineering Council accepted the forensic audit and suspended the privileges of three professors. In 1996 it reversed this decision with no explanation and no hearing.

[5] See Donald C. Savage, "Fraud and Misconduct in Academic Research and Scholarship," 1994.

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[6] The University of Lethbridge Faculty Association v the Board of Governors of the University of Lethbridge, 1991 (Jacobs case, Alan V.M. Beattie Chair); Brandon University and Brandon University Faculty Association, 1994 (Bowman case, Freda M. Steel, Chair)

[7] The following universities have articles in their collective agreements on research fraud: Queen's University, University of New Brunswick, Wilfrid Laurier University, Memorial University and the University of Northern British Columbia.

[8] On research and academics in Nazi Germany, there is a large literature. See for example Robert N. Proctor, "Racial Hygiene: Medicine under the Nazis," Harvard, U.S.A.., 1988.

[9] Dr. Cameron was secretly funded by the C.I.A. to undertake controversial and potentially risky experiments on patients that would assist the agency in understanding the phenomenon of brain-washing. The controversy erupted over whether he knew or ought to have known that some of his research was funded by the C.I.A. and whether he should have made that known to his patients, the hospital and the university. See Anne Collins, "In the Sleep Room: The Story of the CIA Brainwashing Experiments in Canada," Canada, 1988, Don Gillmore, "I Swear By Apollo," Canada, 1987, Harvey Weinstein, "A Father, A Son and the CIA," Canada, 1988.

[10] UNESCO, "Recommendation concerning the Status of Higher-Education Teaching Personnel," Paris, November 1997.

ETHICAL STANDARDS FOR COLLEGE FACULTY

B. ACADEMIC VALUES

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For more than two decades philosophers have been examining the standards of conduct appropriate to a variety of professions. The activities of physicians, nurses, lawyers, business managers, journalists, engineers, and government policy makers have all been subjected to critical scrutiny. Serious questions have been raised about the degree of moral sensitivity displayed in medical offices, courts, and boardrooms. Indeed, philosophers have even served as ethical consultants, and today a hospital staff may include not only surgeons, internists, and radiologists but also a specialist in medical ethics.

One feature of the situation, however, is most curious: the conduct of a particular group of professionals has thus far escaped much detailed investigation. Few have carefully examined the examiners: colleges and university professors. What are the standards of conduct appropriate in classrooms, in departmental and faculty meetings, in grading students, evaluating colleagues, and conducting research? About these important matters we hear too little.

Nor does this situation represent a departure from past practice. For example, in a recent issue of the American Scholar, the sociologist Edward Shils cited a remark of John Dewey, who founded and served as first president of the AAUP. Toward the end of his life Dewey observed that, and here I quote Shils' account of Dewey's statement, "When the American Association of University Professors was formed in 1916, a committee A and committee B were established. One was intended to deal with academic freedom and tenure and the other with academic obligation. The activities of the committee on academic freedom and tenure made up most of the agenda of activities of the Association; the committee on academic obligations had never once met."

I know that many professors take this situation rather lightly. They are apt to echo the faculty member who questioned my own interest in academic ethics: "Why," he said, "be concerned with what professors do? We can't harm anyone." While this colleague believed his instruction could help students, he overlooked the truism that those who can help us can also harm us.

A professor has the opportunity to affect what students believe, to alter their perceptions of the world, to change the way they think. And not only for the better. After studying with certain instructors, students are likely to emerge less open-minded, less commonsensical, less perceptive, less aware. They may be frustrated, confused, or angry. They may have lost the will to learn.

I was reminded recently just how serious the damage can be. Several months ago I received a call from an outstanding graduate student who had already published an article in a major professional journal. She shocked me with the news that she had decided to drop out of school. Her voice filled with agitation, she explained that she had enrolled in a required course, found the material incomprehensible, and decided she was incapable of earning a doctoral degree. Urging her not to act precipitously, I promised to investigate.

What I discovered left me dismayed. The instructor in this required course had decided for his own entertainment to teach an unorthodox version of the subject, one which would have mystified even his colleagues. Yet he never bothered to explain to the students what he was doing. How many became disoriented I do not know. But when I informed the distraught student that the situation was other than she had supposed, she remained uncertain whether to continue her studies, for the semester-long torment had undermined her confidence and commitment.

The teacher who inflicted this suffering acted not maliciously but selfishly. Instead of attending to the needs of his students, he had allowed professorial privilege to lead to self-absorption and consequent neglect of duty.

I wish such incidents were rare. My own experience and the testimony of many others suggest otherwise.

Why are professors averse to being reminded of their potential for causing harm? The answer I think lies in the constraints that morality imposes. For professors are not accustomed to constraints. After all, typical tenured professors more or less set their own schedules. They teach virtually when they want and what they want. They keep whichever office hours they want, they attend such faculty meetings as they want, and they accept committee assignments to the extent they want. If anyone should attempt to interfere with these options, such intruders are apt to be viewed at best as naive or at worst as attackers of academic freedom.

Now, of course, academic freedom is vital to the intellectual life of a college or university. Professors must have the right to pursue, teach, and publish the truth as they see it. But academic freedom is not equivalent to moral anarchy, and morality imposes limitations on personal pleasures. Whether one accepts an Aristotelian, a Kantian, or a utilitarian approach to ethics, the essence of morality remains the same: to be a moral person, one must be sensitive and responsive to other persons. To act morally is to act not only out of concern for oneself, but also out of concern for others.

Many professors act in just this way, deeply concerned with how their actions affect their students and their colleagues. These are the faculty members who act conscientiously, prepare their classes carefully, grade scrupulously, offer students extra help, work with colleagues on departmental matters, and participate constructively in a variety of faculty activities. In short, these are the professors who care about others.

But what about those who do not, who are excessively concerned with seeking their own advantage or well-being without regard to the welfare of others? Such individuals typically reveal their true character in a variety of ways. They support curricula that reflect faculty interests rather than student needs; they organize their courses to cover whatever material they enjoy rather than material their students need to learn; their office hours are as short as possible, and not at times convenient to those who wish to visit; they have on their desks unread manuscripts sent to them for review months before; they never seem to attend a committee meeting - every proposed time is inconvenient.

Unfortunately, one comes across evidence of such selfish behavior all too frequently. But how can we discourage unprofessional conduct without undermining faculty autonomy? This question has not received the attention it deserves. As a result, the university community has not taken appropriate action to minimize the possibility of unethical practices by the faculty.

What can be done to improve the situation? Here are a few modest suggestions.

First, graduate schools should offer formal courses or informal colloquia in which students focus on understanding all phases of a professor's responsibilities, including the many challenges of teaching, research, and service. Emphasis should be placed on the crucial importance and multifaceted nature of a professor's obligations. I am myself currently teaching such a course at a Graduate School and the student shave been enormously receptive and appreciative.

Another suggestion is that candidates for teaching positions should be expected to display a concern for fulfilling professional responsibilities. Too many job interviews amount to little more than glorified doctoral orals. Applicants are quizzed in minute detail about their dissertations or their fields of specialization but not about their overall intellectual interests, their methods of teaching, or their thoughts about the responsibilities inherent in the academic profession. One of the questions I used to ask candidates was: "What do you think about the practice of grading students?" This query often elicited the most amazing views about the rights and obligations of a teacher.

What I am suggesting is that a department should view an academic appointment not merely as the opportunity to gain coverage of a field but as an addition of a colleague who will be expected to fulfill professional responsibilities. If a reasonable doubt exists as to whether an individual will properly carry out these responsibilities, a department might want to make a different appointment.

I would also suggest that members of a department take it upon themselves from time to time to discuss openly professional responsibilities and in the process communicate to all members of the department what is expected of them. If questions are raised about the propriety of some professor's activities, a department should try to find some way of dealing with the issue.

For example, I recall one junior faculty member who always came to class a few minutes late. The head of her department heard about the habit, took her aside, and diplomatically explained that instructors owed it to their students to arrive on time and begin class promptly. The advice was gratefully accepted, and the problem disappeared.

While departments typically guard their rights against the interference of the administration, too often the assumption is made that faculty irresponsibility is a matter for the dean's office, not for departmental action. But responsible departments view the matter otherwise. Advice received from a senior colleague is apt to be far better received than warnings from an administrator. And for colleagues to look the other way in the face of professional irresponsibility is, in effect, to show a disregard for the ethics of one's profession.

One other suggestion I would offer is that it should become standard practice for colleagues to visit each other's classes. I have never understood why some instructors object to visits from professional colleagues but are willing to allow into their classrooms auditors, friends or relatives of students, and even faculty members from other departments. What would we think of a surgeon who allowed into the operating room all visitors except other surgeons?

If classroom doors were open, professors who might otherwise shirk their responsibilities would be motivated to prepare more carefully and would tend to shun dubious pedagogical practices they would rather not have their colleagues observe. As for professors who excel in the classroom, they should welcome an open-door policy. After all, fine pianists are eager to perform in the presence of other pianists. Why shouldn't fine teachers be eager to teach in the presence of other teachers? We encourage our colleagues to read our articles; why shouldn't they be invited to attend our classes?

Such a policy would also lead to what I believe would be a positive development - lesser reliance on student evaluation of teaching.

Who is obligated to evaluate the teaching performance of faculty members? I realize that it has been argued that learners are the best evaluators of their own responses drawing an analogy to the restaurant patron who is a better judge of the food than the chef. But while those who eat surely know how the food tastes, its nutritional benefit is judged more reliably by a nutritionist, just as educational value is best judged by an educator.

Students, by definition, do not know the subject matter they are studying, so they are not in the best position to judge how well it is being taught. Perhaps they find a concept difficult to grasp. Is the instructor to blame or is the difficulty intrinsic to the material? Can the matter be explained more effectively? Perhaps not. An apparently easier way may be only a distortion.

Admittedly, student ratings yield quantifiable results that can easily be given the appearance of exactitude. For example, some time ago I happened to see a computer-generated spreadsheet, typical of those provided each semester to faculty members at many colleges. It indicated that in a particular course, on a scale of 1 to 5, the instructor scored 4.85 for "Mastery of Subject," while the average for instructors for all sections of the course was 4.67; for all courses in the department the average was 4.50; for all the courses in the school it was 4.62. Whatever trust the credulous might place in such pseudo-precise statistics, it should be noted that the course in which this instructor received a superior rating for his knowledge of subject matter was English composition. Sending such inane data to faculty members with the understanding that their scores will play a significant role in the consideration of their reappointment, promotion, or tenure is demeaning to all involved.

Unfortunately at some schools the numbers are used in just such an unthinking way. Recently I sat in a discussion of this issue and heard the head of a department say with pride that he never reappointed any faculty member who did not score at least 5.0 out of a possible 7.0 on student evaluations.

Unquestionably, some instructors who receive unflattering evaluations deserve them. But other instructors are victims of their unyielding commitments to tough course requirements, demanding examinations, rigorous grading procedures, or unfashionable intellectual positions. Since student evaluations cannot be relied on to distinguish such conscientious faculty members from their unworthy colleagues, total dependence on these evaluations not only distorts the proper relationship between teacher and student but also menaces academic standards.

Granted, some educational researchers, though by no means all, have concluded that student evaluations do provide useful information. But the key insight, supported in hundreds of studies, is that student evaluations always need to be considered in the context of peer evaluations. Otherwise, as one researcher puts it, institutions are "flying blind."

The crucial point is that faculties rightfully claim authority in academic affairs. They should not abandon that claim when the time comes for evaluating their members.

Let me conclude by re-emphasizing two points. First, professors not only have rights; they also have responsibilities. And second, those with the primary obligation to ensure that these responsibilities are fulfilled are not administrators or students but the faculty members themselves.

C. ETHICS, COLLECTIVE BARGAINING AND THE COLLECTIVE AGREEMENT

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From the very beginning of faculty unionization in North America, the role of ethics in the practice of collective bargaining, and in the collective agreements that result from that process, has been the center of a great deal of debate. Indeed, as anyone who has been involved in a certification drive will know first hand, many of the opponents of unionization have chosen to frame their arguments in ethical terms. Some argue that it is unethical to choose adversarial methods, which are presumed to be inherent features of collective bargaining. Others argue that trading the reasoned debate of the academy for the exercise of raw power, also deemed to be an essential characteristic of collective bargaining, undermines the ethical character of the university. Still others argue that the contemplation of strike action is a breach of faith with our students, or at the very least an unsupportable attack on the interests of innocent bystanders. Yet others argue that the submergence of individual interests under those of the collective is unethical.

This paper argues that such positions are false, that ethics are at the very heart of the process of collective bargaining, and that the collective agreements themselves are the best available tool for the definition and promotion of high ethical standards in the university. The experience of collective bargaining at the University of New Brunswick (UNB) is used to illustrate these points.

THE UNIVERSITY OF NEW BRUNSWICK

The University of New Brunswick is a mid-sized university with approximately 10,000 students and 600 faculty on its two campuses. It shares with Georgia the distinction of being the oldest state supported university in North America. It was founded in the wake of the American Revolution by so-called United Empire Loyalists who left the new republic to maintain their loyalty to the British Crown.[1] Many of the Loyalists were graduates of prestigious American and British institutions, and were people of considerable economic means. They saw the necessity of good education to provide for the prosperity of their new land and to develop the necessary leaders. The university they founded was explicitly secular from the beginning, and to this day the charter provides for the university to teach all subjects except religion.[2]

Like many other Canadian universities, UNB remained small and somewhat exclusive until after the Second World War, when rapid growth took place to accommodate returning servicemen and women. The growth became explosive in the 60's and 70's, and has continued at a slower pace to the present. The result is a typical Canadian state-supported university. Provincial government grants provide about 70 percent of the revenue, with most of the rest coming from student tuition.

UNIONIZATION AT UNB

The early history of collective bargaining at UNB showed little promise of the mature and creative relationship tnat has subsequently developed. It is worth telling some of the story as living evidence that even disastrous circumstances can be rescued if there is sufficient commitment and hard work on both sides of the bargaining relationship.

The transformation of the Association of UNB Teachers (AUNBT) from a professional association to a trade union took place in the mid 70's in response to what was perceived to be an increasingly remote and authoritarian administration, and a botched strategic planning exercise that was at least unrepresentative of faculty views and seen by most as being offensive.[3] The planning report called for sweeping changes, including a dramatic increase in student/faculty ratios by eliminating more than one third of the faculty, placing rigid quotas on the number of tenured positions, and strictly limiting the number of full professors. One phrase came to characterize the report. It suggested that many of the current faculty should "seek academic fulfillment elsewhere." That became a rallying cry for certification.

After a three month sign up campaign, AUNBT applied on January 12, 1978, to the New Brunswick Industrial Relations Board for certification as bargaining agent for all persons employed full time as teachers, researchers or librarians. This application was challenged not only by UNB but by two rival unions. The Engineering and Forestry Faculty Association, and the Law Faculty Association sought to represent faculty in their respective disciplines. Hearings before the Industrial Relations Board were complex, acrimonious and lengthy. After more that a year of turmoil, the Industrial Relations Board ordered a certification vote, in which 309 of 517 eligible voters were in favor of being represented by AUNBT. The Board certified AUNBT as agent on March 30, 1979.[4]

AUNBT immediately gave notice to bargain, and negotiations for a first collective agreement began in May, 1979. Negotiations proved equally difficult and protracted. After seven months, agreement had been reached on only three articles, all of which were presumed by the New Brunswick Industrial Relations

Act to be in all collective agreements. Opponents of the union were interested in further delay of negotiations because under New Brunswick law an application for decertification could be filed if no collective agreement was in place by one year after the original certification (i.e. by March 30, 1980).

In an effort to force some movement, AUNBT applied to the Department of Labor for the services of a conciliation officer in January 1980. Two conciliation officers were appointed, one of whom was the chief of the conciliation service, and negotiations began to progress slowly but steadily. After one of the longest periods of conciliation in New Brunswick history, talks broke down completely on July 4, 1980 with all issues agreed except salaries and salary structure.

In an attempt to avoid a strike, the Department of Labor made it known that they were prepared to take the highly unusual step of appointing a Conciliation Board if both AUNBT and UNB agreed to be bound by the decision of the Board. Both parties agreed to this demand for what amounted to an arbitration of the outstanding issues, and hearings were commenced in October of 1980. After the Conciliation Board issued its ruling, the first collective agreement was signed by the parties on November 3, 1980, more than three years after the start of the certification campaign. During all of that time, salaries and other terms of employment were frozen in accordance with New Brunswick labor law, resulting in UNB having the lowest salaries in Canadian universities.

This history is difficult enough in itself, but there was an equally damaging process going on in parallel throughout much of this time. When the term of the university president was nearing an end in 1978, the academic Senate of the university[5] had managed to appoint a former president of AUNBT, one of the most outspoken advocates of unionization, and opponents of the planning report, to a position as Co-Chair of the joint Senate/Board of Governors Committee to search for a new president.[6] The committee decided to open nominations and treat the incumbent no differently from any other candidate. In the face of that decision, the incumbent declined to re-offer, and the chief negotiator for the university was appointed acting president.[7]

The Committee subsequently nominated for president a candidate who had served for only a short time as dean at another university, after having served as the chief negotiator of the faculty union at that institution. It also happened that AUNBT had used many of the articles from that collective agreement as model clauses during the negotiations. Many opposed to unionization saw this nomination as a blatant attempt to impose a president who would favor the union. An aggressive campaign was begun to oppose the committee's nomination and to appoint the acting president to a full term. Supporters of the union began a counter campaign. After a great deal of further turmoil and acrimony, neither the committee's nominee nor the acting president received the necessary majority in both the Senate and the Board of Governors. The Search Committee resigned, and a new search was instituted.

The president selected from this second search committee was appointed in time to play an active role in reaching the final settlement and in the decision to arbitrate the outstanding issues. Nevertheless, the first collective agreement was reached in a period of turmoil and after considerable acrimony and division. It was a major challenge to pick up the pieces and build a strong bargaining relationship. This was achieved by a lot of hard work and good will on both sides and a strong and consistent commitment to ethically based bargaining.

COLLECTIVE BARGAINING AT UNB TODAY—ETHICS IN ACTION

From that rocky beginning, UNB has built a reputation for an exceptionally strong collective bargaining relationship. It is viewed by many among both faculty unions and university administrators as the best collective bargaining relationship in Canada.

In part, this has resulted from an unusual continuity on both sides. The current AUNBT Executive has four members who served on the first negotiating teams.[8] Two of those have been involved in all collective bargaining at UNB, and one has worked on the administration of the collective agreement through the Grievance Committee since 1980. Several others have ten or more years of experience with negotiations and/or administration of the agreement. On the administration side, the director of human resources (who has primary responsibility for negotiating and administering the collective agreement) has held that position since shortly after the first collective agreement was signed, and the same vice president (finance and administration) has been in place during the entire time.

However, the major reason for success has been the adherence to high ethical standards on both sides. This has built a reservoir of trust and understanding that is indispensable when difficulties arise, as they inevitably will in any relationship.

The parties engage in what is sometimes called interest bargaining. They attempt to agree on matters that are of longterm interest to the university community, and bring their different perspectives to bear on solving problems that arise on the path to achieving those common interests. Both sides "play the long game" and shun short term or narrowly defined advantages. Both also respect the essential interests of the other, and attempt to refrain from infringing those interests. There are nearly daily discussions on one matter or another and a free exchange of information of all types, including very detailed financial information. The result is a cooperative, problem-solving approach, in which everyone strives to ensure that there are no surprises.

The underlying values of this approach can be described in terms of what has been called the ethics of right relations. In this framework, special emphasis is placed on building and enhancing the strength of the relationship. Actions which contribute to this strength carry a positive value on the ethical scale. Those which weaken the relationship, carry a negative value. A high value is placed on the relationship itself, and there is an implicit understanding that more can be accomplished in the long term if that relationship is nurtured. That nurturing becomes a goal of collective bargaining in itself, over and above the particular issues under discussion. There is an acceptance that the different perspectives of the two parties have value and should be respected and incorporated into effective solutions. There is a give and take of trust which enables all parties to enjoy a greater comfort level when they take the risks that are essential to seeking the compromises that are necessary to problem-solving. That trust also allows larger risks to be taken, which speeds the attainment of a solution.

This is an inherently cooperative model. It represents a sort of sustainable development approach to collective bargaining. Damage is done to the relationship if one party is pushed to the wall. This undermines the longterm sustainability of the agreement as surely as slash and burn agriculture undermines the longterm sustainability of the crops on the land and the welfare of those who depend on those crops. Adversarial interactions are replaced by a genuine respect for the legitimate interests and perspectives of the other party, and an expectation that the interests and perspectives of each side will be equally respected and valued. The thrust of debate is replaced by an exploration of possible solutions and win-win scenarios. The exploitation of strategic strength to force concessions from the other party is replaced by building a mutual understanding of your respective interests and what is possible for each side to sustain.

The result has been a degree of trust and cooperation that is unique in Canadian university collective bargaining. There is a genuine acceptance of the responsibilities which come with the rights defended by each side. Cooperative ventures include orientation for new faculty, training for members of assessment committees, chairs of departments and deans on the assessment procedures and criteria, workshops on effective recruiting, and a pension plan that is jointly sponsored, administered and funded. All of this was made possible by the adherence to the ethical basis of collective bargaining described above.

ETHICS AND THE COLLECTIVE AGREEMENT

The recognition of the essential ethical role of the collective agreement is both an outcome and a cause of this ethical approach to the practice of collective bargaining. The collective agreement itself is, and must be, a reflection of high ethical standards. It is a major vehicle for the articulation of ethical standards and for building support and respect for those standards in the academic community. It is equally important as an education tool. Because it sets the framework within which most other activities in the university take place, the ethics actually practiced in a host of areas from personal behavior, to the reward system, to the manner in which research is conducted are dependent upon setting the ethical context in the collective agreement.

Ethical codes are most effective when they are embraced by the community in practice, not merely when they are written down, however articulately that may be done. Attempting to impose a code, with very little buy-in from the practitioners, will result in evasion and resentment even when there is a grudging conformity. If the codes seem impractical, or seem not to apply to the particular situation in which faculty are engaged, or do not recognize and respect legitimate interests of the faculty, they will be ineffective at best and give rise to contempt and neglect at worst.

The most effective way to ensure that codes are relevant, practical, understood and practiced is to negotiate those codes as a normal part of collective bargaining and to include them in the collective agreement. Through the usual consultative mechanisms employed by unions, all those who will be expected to practice the ethical standards will have an opportunity for input. They will also have extensive opportunities to discuss the principles with people who are seen explicitly as their advocates and representatives and are therefore viewed with a greater level of trust. This consultative phase provides both an extended period of education and an opportunity for buy-in and ownership. The standards espoused cannot be seen as distant, threatening, or even irrelevant, if those to whom they apply are actively involved in their development. They become a property of the community, rather than some abstract principles imposed from outside. In short, they become "our standards" rather than "their standards."

There are a number of examples of ethical codes in the UNB collective agreement,[9] starting with the Preamble:

> The Parties acknowledge the objectives and purposes of the University to be the attainment of the highest standards of academic excellence, the advancement of learning and the pursuit and dissemination of knowledge.... The Parties recognize they have a responsibility to encourage within the University an environment which is conducive to the achievement of these objectives.... to promote and maintain harmonious relationships between the Parties in accord with these objectives, and to provide fair, just and equitable means for settling disputes.

Although these could be seen by some as hollow words, they have become an integral part of what is done by the administration and union in practice, and much of the collective bargaining relationship is measured against those simple standards. They can be seen as a simple test of the ethics of right relations which the parties seek to practice.

Articles on Collegial Rights, Academic Freedom, Non-Discrimination, Professional Responsibilities, Assessment Procedures and Criteria, Official Files, Sexual Harassment, Employment Equity, Positive Action to Improve the Status of Women, and Fraud and Misconduct in Research all have extensive statements of ethics within them as a basis for the specific provisions that are designed to put those standards into effect.

Of particular interest in the present discussion are the articles on Sexual Harassment and Fraud and Misconduct in Research. Each is a statement or code of ethics, actively negotiated by the parties. In each case, they were the first such provisions included in a collective agreement at a Canadian university.

SEXUAL HARASSMENT

In the early 80's it was becoming increasingly clear throughout North America that sexual harassment in the workplace was a pervasive problem. Seeing the need to provide leadership on this issue and to articulate appropriate standards of behavior, the union prepared a draft article based on CAUT policy statements. The university administration chose to prepare their own policy with the intent of having a statement, a definition, and procedures applicable to any member of the academic community approved by the Board of Governors. At first they refused to negotiate the inclusion of such an article in the collective agreement on the grounds that to do so would result in different policies for different groups within the university. The union insisted that members needed the protection provided by such an article, and that both the definition and procedures for investigation were essential interests of anyone accused of sexual harassment and could not be unilaterally imposed by the Board.

It was clear to both parties that they shared an interest in preventing sexual harassment, and could cooperate on education and prevention programs. Their differences were largely in the area of what would happen if an incident occurred. The union favored an emphasis on information and support for the victim and on informal mediation procedures to resolve complaints at an early stage before they progressed to a damaging level, with formal investigation procedures and disciplinary action occurring if informal attempts failed. The university administration favored a more formal approach, with written complaints, complete documentation, and a formal investigation of each complaint. The union argued that such formal procedures immediately escalated every complaint, forcing the person against whom the complaint was issued into a defensive posture. It also argued that it should be as simple as possible for a complaint to come forward and be resolved so that inappropriate behavior could be "nipped in the bud." Both parties recognized the need for prompt action, a resolution which would be seen as fair, and confidentiality in the process.

The compromise was simple. The parties agreed to an article in the collective agreement that began by specifying that sexual harassment could be the subject of disciplinary action and providing a detailed definition of sexual harassment. It then required the university to establish and publicize procedures for the treatment of complaints, which allowed the flexibility for the university to have a uniform code for everyone in the academic community. However, the collective agreement put limits on the content of the policy by requiring that it would include initial contacts to provide information to victims, an informal process to attempt a resolution, a process for filing a formal complaint if informal attempts at resolution failed, and a process for formally investigating and dealing with formal complaints promptly, fairly, judiciously and confidentially. The collective agreement then specified appropriate protections for the accused, including written notice of the charges, an opportunity to respond, the right of union representatives to be present at all meetings and hearings during the formal process, the "without prejudice" nature of any statement made by the accused during informal stages prior to the filing of a formal complaint, the right to grieve and arbitrate any discipline imposed, and appropriate handling of the documentation for the case.

This success was made possible by focusing on shared interests, and by each party respecting and accommodating the specific concerns of the other. After the agreement was in place, the parties cooperated on developing and reviewing the university policy, on the selection and training of a group of sexual harassment advisors to provide information about the policy and to carry out the informal activities specified, and on publicizing the policy. It has proven effective in dealing with a wide variety of complaints, both informally and formally.

Nevertheless, the story is not uniformly positive. The information and education component still needs considerable work. Students, in particular, are not sufficiently aware of what they can do if they experience sexual harassment, and there are still too many cases of offensive behavior. The policy has recently come under a harsh light in the wake of a highly publicized case. An award-winning instructor was suspended without pay for misconduct after a formal investigation of complaints from three different students. Two of the students were dissatisfied with the outcome and chose to file civil suits against both the university and the instructor involved. Although the first level of courts dismissed the suits, there continues to be considerable public discussion of the policy. Some argue that the policy has failed because it did not prevent the event from occurring. Although this could well be the ultimate objective, even the best of policies can founder on individual frailty. The fact is that prompt action was taken to stop the offensive behavior and to punish the perpetrator when the matter was brought to the attention of the appropriate authorities.

FRAUD AND MISCONDUCT IN RESEARCH

As Donald Savage, former executive director of CAUT, has detailed in his paper at this conference,[10] the three Canadian federal granting agencies (the Medical Research Council, the Natural Sciences and Engineering Research Council, and the Social Sciences and Humanities Research Council) jointly issued a policy statement on "Integrity in Research and Scholarship." This statement essentially required all universities receiving funds from these councils (which in practice means all universities in Canada) to establish policies on research fraud and misconduct.

The AUNBT immediately made known to the university administration that it intended to negotiate such a policy for inclusion in the collective agreement. The interests of the parties turned out be remarkably similar to those for sexual harassment. Both parties has a shared interest in establishing a working policy and educating the academic community. Once again, the university administration was concerned about having a single policy to cover all research participants and pointed out that fraud and misconduct could equally be perpetrated by graduate students and technical staff. The union recognized the importance of a detailed definition of fraud and misconduct, and of establishing effective and fair procedures for prompt investigation of complaints. Perhaps not surprisingly, the resulting article was structured in many respects on the existing article on sexual harassment.

The article begins by recognizing that fraud and misconduct in research could be the subject of discipline, mirroring the wording in the sexual harassment article. A detailed definition was then presented.

This definition of fraud and misconduct focused on four areas. The first dealt with fabrication, falsification or plagiarism of research, but was careful to exclude those factors which are intrinsic to research, such as honest error, conflicting data, and differences in academic interpretation or judgement. This was done to ensure that the offense was willful deception and not incompetence, confusion, straying from orthodoxy, or perhaps even exhibiting genuine creativity in choice of methods. The second part of the definition dealt with material failure to comply with reasonable regulations and requirements for the protection of researchers, subjects, the public, laboratory animals and the like. The failure to comply should not be merely technical in nature, and the regulations and requirements should be those that were published and known, or should have been known. The third part dealt with failure to disclose material conflicts of interest in the review of other work and the testing of products. The final part covered failure to reveal a material financial interest in any company contracting with the university to undertake research, particularly research on that company's products.[11]

The article then specifies appropriate procedures. Original allegations of fraud or misconduct must be addressed to the university president to emphasize that such allegations are extremely important. The first step is for the president (or designate) to assess whether there is sufficient substance to warrant investigation. This is intended to weed out frivolous complaints or those which do not, on their face, constitute fraud or misconduct as defined in the agreement. Once the decision is taken to formally investigate, the procedures are very much parallel to those used for sexual harassment. Written notice of the allegation is given in sufficient detail to allow an opportunity to respond, the individual has the right to be represented by the union and is advised to contact the union before responding to the charges, the right of union representatives to be present at all meetings and hearings during the formal process is established, any statement made by the accused outside of those meetings and hearings is strictly without prejudice, the individual involved is guaranteed adequate opportunity to know any evidence presented and to respond to that evidence, the individual maintains the right to grieve and arbitrate any discipline imposed, and appropriate procedures for handling the documentation for the case are set out.

So far, fortunately, there has been only one allegation raised under the terms of this article. A graduate student who had left the university after completion of her degree complained about what she regarded as improper use of her data by her supervisors. The uncontested facts were that the student had not written a paper based on the results, that the supervisors did so after she left the university, including the former student as a joint author, and that this paper was submitted to a journal for publication. Many other facts were in dispute, involving such matters as what opportunity the student had to comment on the proposed paper, who had obtained the funding for the research, and what agreements had been reached about the use of the data and the conclusions.

The union contended that the complaint did not, on its face, satisfy the definition of fraud and misconduct and should be dismissed. There was no fabrication, falsification or plagiarism, although there may have been differences of opinion as to the interpretation of the data. In the view of the union, the essential issue was whether the supervisors of the student, and holders of the grants that had at least in part funded the research, could attach their names to a paper written by them on the basis of data taken by the student. Given that there was no attempt at deception or attempt to deprive the student of academic credit, the union believed the case would not proceed to investigation. Nevertheless, the university president appointed a designate to investigate. In the end, the faculty members were exonerated of any misconduct, but agreed to withdraw the paper.

CONCLUSION

The experience at UNB has shown that strong and consistent adherence to an ethical code for the conduct of the collective bargaining process can lead to the development of a very positive bargaining relationship even when starting from a very inauspicious beginning. This in turn makes possible the development of the collective agreement itself as an ethical document. The process of arriving at agreement provides the wide discussion, the weeding out of impractical provisions, the broad acceptance and buy-in, that turns a code of ethics into an active instrument. This, in its own turn, produces an environment in which ethical considerations are front and center in the activities of the university. It generates a strength of purpose and a positive identity among the various members of the university community, and emphasizes the responsibilities that they share in achieving the objectives and purposes of the university. It becomes not only a right relationship, but an energetic and creative one, a new and more powerful collegiality.

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[1] As a minor aside, it is often interesting to American visitors to find on display at UNB as a prized artifact from the loyalist founders, a letter written by Benedict Arnold.

[2] At the time of the founding of UNB, it is said that there were more graduates of Harvard in New Brunswick than in Massachusetts.

[3] Report of the Academic and Campus Planning Committee, 1976.

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[4] New Brunswick Industrial Relations Board Order IRB T-2-78, signed by Board Chair Weldon Graser, Q.C., 30th day of March, 1979.

[5] The university has a bi-cameral governance structure. The Senate, consisting mostly of academic administrators, elected faculty and students, is responsible for academic matters. The Board of Governors, consisting mostly of government and alumni appointees, is responsible for financial and other non-academic matters.

[6] The UNB Act provides for a joint search committee for president consisting of equal numbers of representatives of both the board of Governors and the Senate. The Act requires that the ratification of a nomination by the committee requires majorities in both the Board of Governors and the Senate, voting separately.

[7] He was replaced as chief negotiator once he assumed his duties as president.

[8] Three of these were on the union side, the fourth was on the original administration team.

[9] The collective agreement can be found on the web at http://www.unb.ca/AUNBT/ca.htm.

[10] Donald C. Savage, Ethics and the University Professor.

[11] The last two issues has some local currency, as well as being important in their own right. During the 70's and 80's the province of New Brunswick was involved in a massive aerial spray program to combat spruce budworm infestation of the forests on which much of the provincial economy depends. There was a great deal of controversy about the real and potential impacts of this program on the environment and the health of the general population. The company carrying out the spraying on contract to the provincial government had established a monitoring program. Not surprisingly, the research emanating from that source was viewed with skepticism by the public. The company had then sought to establish this monitoring program, including its staff, within the university, in what was taken by many observers to be an attempt to use the imprimatur of the university to provide greater credibility to the research. Staunch opposition within the university stopped this from happening despite the strong interest on the part of some university administrators in accepting the contract.

ETHICAL STANDARDS FOR COLLEGE FACULTY

C. RIGHTS AND RESPONSIBILITIES OF FACULTY[1]
UNESCO ADOPTS AN INTERNATIONAL STATEMENT[2]

Donald C. Savage[3]
Retired Executive Director, CAUT

PART 1: WHAT DOES THE STATEMENT SAY?

Last November the governing body of UNESCO, meeting in Paris, adopted an international statement on the rights and responsibilities of higher education teaching personnel. This was the culmination of a long campaign by CAUT and other national federations of academic staff to secure an international standard dealing with academic freedom as well as the civil, economic and other rights of faculty and to spell out the responsibilities that went with these rights. The statement also sets out a standard for the autonomy of higher education including institutional rights, duties and responsibilities. The document firmly links rights and responsibilities, tenure, autonomy and collegial governance, and proper terms and conditions of employment as a package – an important innovation since these questions are usually discussed separately.

Faculty association federations in the United States, Canada and elsewhere in the OECD took up this cause in the first instance so that there would be a standard for judging those dictatorial and authoritarian governments which restrict academic freedom and abuse their academic staff through imprisonment and other cruel and inhuman practices. "However", said Dr. Bill Bruneau, President of CAUT, "the document has a very long reach and deals with matters of the highest importance for the academic community throughout the world including Canada."

Many of the member states of UNESCO from all parts of the world spoke at the General Conference in favor of the statement. No state voted against it, and only four expressed a reservation and then only about the chapter on terms and conditions of employment.

The section of the document on rights states that access to the profession should be based solely on appropriate academic qualifications, competence and experience, equal for all members of society without discrimination. "Higher-education teaching personnel," it argues, "like all other groups and individuals should enjoy those internationally recognized civil, political, social and cultural rights applicable to all citizens," including freedom of thought, conscience, religion, expression, assembly and association as well as the right to liberty and security of the person and liberty of movement. Academic staff should not suffer penalties because of the free expression of their opinion of state policies or policies on higher education.

The statement then defines academic freedom which, it says, should be scrupulously observed. Academic freedom guarantees the right to teach freely according to accepted principles of professional responsibility and intellectual rigor as well as the freedom to carry out and disseminate the results of research. It also includes the freedom to criticize one's own institution as well as the education system without fear of reprisal and the freedom to participate in professional or representative academic bodies.

In addition, "Higher-education teaching personnel should have the right and opportunity, without discrimination of any kind. According to their abilities, to take part in the governing bodies" of higher education institutions "and to criticize the functioning of higher education institutions, including their own, while respecting the right of other sections of the academic community to participate, and they should also have the right to elect a majority of representatives to academic bodies within the higher education institution." The statement then links academic freedom and collegiality, and goes on to say: "Collegial decision-making should encompass decisions regarding the administration and determination of policies of higher education, curriculum, research, extension work, the allocation of resources and other related activities, in order to improve academic excellence and quality for the benefit of society at large." In another section, the document states that "self-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education."

The Recommendation states that tenure or its functional equivalent "...constitutes one of the major procedural safeguards of academic freedom and against arbitrary decisions." "It also," this section says, "encourages individual responsibility and the retention of talented higher-education teaching personnel." It notes that academic staff can be dismissed for just and sufficient cause related to professional conduct. It permits lay-offs for bona fide financial reasons "...provided that tall the financial accounts are open to public inspection, that the institution has taken all reasonable alternative steps to prevent termination of employment, and that there are legal safeguards against bias..." Tenure, the document says, should be safeguarded even when changes within an institution or the system as a whole are made. The phraseology concerning the functional equivalent of tenure was adopted to deal with the situation in Germany and Japan where academics are civil servants and where the word tenure in the North American sense is, therefore, not used.

The UNESCO statement stresses the importance of autonomy. "Autonomy," it says, "is the institutional form of academic freedom...." Member states should protect their universities and colleges from attacks on their autonomy. However, it also states that autonomy should not be used as a pretext or a vehicle to limit the individual rights of higher education teaching personnel.

"Systems of institutional accountability," UNESCO states, "should be based on a scientific methodology and be clear, realistic, cost-effective and simple. In their operation, they should be fair, just and equitable. Both the methodology and the results should be open."

Furthermore, institutions themselves or as a group should design and implement appropriate systems of accountability. Faculty associations should participate in such planning. State systems of accountability should be negotiated both with the institutions and the organizations representing higher education teaching personnel.

The sections on institutional autonomy and on the rights of individuals are balanced by two articles on responsibilities. These cover both institutional and individual responsibilities – another interesting linkage. Both are wide ranging. Higher education institutions should be accountable for a commitment to quality and excellence in teaching, scholarship and research and for assuring the integrity of these functions against intrusions inconsistent with their academic missions. There follows a variety of other responsibilities including institutional support for academic freedom, fairness to students, equal treatment of women and minorities and the adoption of policies to deal with sexual and racial harassment, honest and open accounting and the efficient use of resources. Individual responsibilities include the obligation to teach effectively within the means provided, to be fair and equitable in dealing with both male and female students and with those from minority groups, and to be fair and impartial when called upon to judge colleagues or students. There are also provisions dealing with the ethics of research, the avoidance of conflict of interest, the need to participate in university governance as well as public accountability. Accountability should involve academics "...without, however, forfeiting the degree of institutional autonomy necessary for their work, for their professional freedom and for the advancement of knowledge."

The UNESCO statement also contains an extensive chapter on terms and conditions of employment. A series of conventions of the International Labour Organization are included by reference such as the various ILO conventions on freedom of association, the right to organize and the right to engage in collective bargaining. So too are earlier UNESCO conventions and declarations on discrimination, racial prejudice, technical and vocational education, and the rights of scientific researchers as well as the major human rights documents of the United Nations itself.

This section calls for terms and conditions of employment that will be the most conducive for effective teaching, research and scholarship, and that will be fair and free from discrimination. It calls for fair procedures for appointment, promotion, tenure, dismissal and related matters.

The statement suggests a significant role for organizations that represent higher education teaching personnel. Such organizations, it says, "should be considered and recognized as a force which can contribute greatly to educational advancement and which should, therefore, be involved, together with other stakeholders and interested parties, in the determination of higher education policy." They should also have the right to organize freely under labor legislation, to negotiate terms and conditions of employment and to participate in a fair and just system of labor relations.

"The adoption of this statement is a great triumph," said Dr. Bruneau. "It represents a vision for the world of how things ought to be in higher education. We must strive to ensure that the world's governments and universities live up to these ideals."

PART 2: THE UNESCO STATEMENT – A HISTORY

The saga began thirty years ago when UNESCO adopted a Recommendation on the Status of Teachers. This was designed to set out the rights and responsibilities of primary and secondary school teachers. At the time there were demands to expand this document to include higher education but this did not happen. Since then UNESCO has created documents on the rights of scientific workers and of artists, but despite considerable effort, nothing was done officially by UNESCO in regard to higher education teachers until the General Conference of 1993 other than calling for various feasibility studies.

In the meantime a variety of bodies including the World University Service, the European rectors, and certain unions and professional bodies carried out studies and some adopted statements concerning academic freedom.

In the late 1980s, the International Conference of University Teachers' organizations (ICUTO), took up the issue of a UNESCO Recommendation or statement on higher education teaching personnel parallel to that on the status of primary and secondary school teachers. CAUT and the Syndicat National de l' enseignement superieur in France took the lead. At the Ottawa meeting of ICUTO in 1989, the members agreed formally to support a UNESCO normative instrument. In 1991 CAUT commissioned Pat Finn, the business agent of the Carleton University Academic Staff Association, to produce a draft international instrument in proper legal language for discussion at the meeting of ICUTO in Washington in 1992 and adoption at a subsequent meeting in Berlin in 1993. Not everyone in the international higher education world was enthusiastic, but there was enough support in UNESCO to warrant proceeding with the project. This was in large part because another Canadian, Ramzi Salame, former President of the faculty union at Universite Laval, had done a feasibility study for UNESCO.

The General Conference of UNESCO in 1993 decided that there should be a UNESCO instrument and instructed the Director General of UNESCO to produce a draft which was completed by September 1994.

The draft was extensively discussed between UNESCO and the ILO. The Recommendation on the Status of Teachers was a joint document of the two organizations. The one on higher education is solely the legal responsibility of UNESCO, but UNESCO could not deal effectively with such matters as terms and conditions of work without an agreement with the ILO. The draft was also circulated to a variety of international organizations representing unions, management and others in higher education. All this produced a year of vigorous internal debate before a consensus was reached.

UNESCO then circulated the proposed statement to the 186 member states in preparation for a meeting of experts nominated by 20 states. Member states were invited to send written submissions. The meeting of experts was held in October 1996. An additional 52 came as observers from a variety of states but with the right to speak. There were as well representatives of international NGOs as well as the ILO. A working party was struck which produced a compromise but which was faithful to the original document. There was lively debate. Dr. Rasha al-Sabah of Kuwait was chair.

The Recommendation was strongly opposed by Nigeria which argued against the reference to the civil rights of faculty, Saudi Arabia which wanted to entrench tradition, and South Korea which thought that the document was an assault on Asian values which better protected academics than European human rights. Other countries, particularly from Eastern Europe and South America, rejected the appeal to tradition. Japan, as one of the key players in UNESCO and a member of the working party, supported the compromise, and it was ultimately adopted by the meeting with a few amendments. Regrettably the United States government played no role in this process since it left UNESCO some years ago and remains one of the few governments in the world not a member. However, the American national union federations – the AAUP, the AFT and the NEA – were significant players.

That document was re-circulated to the member states for the 1997 General Conference where no one spoke against it. One of the strongest speeches in favor came from the Canadian delegation. The delegate of the Vatican said that the statement nicely balanced rights and responsibilities. With two minor amendments by Portugal, the General Conference of UNESCO adopted the document in November. It is technically called *The Recommendation concerning the Status of Higher-Education Teaching Personnel*, and it now takes its place officially with other United Nations' documents which over the years have spelled out the rights of humanity which now include the rights of higher education teaching personnel.

PART 3: BUT DOES IT HAVE TEETH?

The UNESCO Recommendation is not a convention and is, therefore, not legally binding on the member states. Such UNESCO statements have, however, considerable moral force, and UNESCO hopes that member states will live up to the obligations for which they voted at the General Conference. It also expects that various aspects of a statement such as this one would be incorporated into the laws and practices of the member states. Such documents tend to develop a life of their own. The more they are used and quoted around the world, the more effective they become.

Furthermore, in the section on civil rights of academics (article 26), the document states: "in cases of gross violation of their rights, higher-education teaching personnel should have the right to appeal to the relevant national, regional or international bodies such as the agencies of the United Nations, and organizations representing higher-education teaching personnel should extend full support in such cases." This means in practice that cases involving the arbitrary arrest or detention of academics, torture, or cruel inhuman or degrading treatment could be appealed to the office of the Director-General where there is a structure for the handling of such cases.

Article 75 also mandates the Director-General to prepare a comprehensive report on the world situation in regard to academic freedom and to the respect of the human rights of higher-education teaching personnel not only from the information supplied by member states but also on the basis of any other information supported by reliable evidence gathered by such methods as the Director-General may deem appropriate. It is not as yet clear exactly how this will be done, but it is a commitment.

During the debate at the General Conference, the representative of the International Labour Organization said that there needed to be an effective follow-up mechanism. He suggested the enlargement of the mandate of the current ILO/UNESCO committee (CEART) which hears complaints concerning the rights of primary and secondary school teachers. Australia opposed such a follow-up mechanism. Most of the member states remained silent on the issue, preferring to deal with the document itself before addressing the question of follow-up.

There was also some discussion in the corridors of the need for UNESCO to have a center which would not only deal with serious complaints but would also commission research on the state of academic freedom and human rights in the academy throughout the world.

Finally, in the fall of 1998 UNESCO will be hosting a world conference on higher education that is likely to result in a declaration on higher education. I hope that this conference may address itself to the question of how best to ensure that the right spelled out in the *Recommendation concerning the Status of Higher-Education Teaching Personnel* are, in fact, respected around the world.

Further information concerning the Recommendation can be secured from the Higher Education Division of UNESCO and the text can be found on the CAUT website at www.ei-ie.org/emenunew.htm.

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[1] This is a shorter version of a report originally prepared for the CAUT Bulletin in January 1998 and for a meeting of the International Conference of University Teachers Organization (ICUTO) in Melborne in February 1998.

[2] UNESCO, formed in 1945, is one of the specialized agencies of the United Nations along with the ILO, WHO, and FAO. Its area of responsibility is education, science and culture. There are 186 member states but not the United States. The full title of the UNESCO statement is *Recommendation concerning the Status of Higher-Education Teaching Personnel.*

[3] The author was consultant to the Higher Education Division of UNESCO and drafter of the text that, with amendments, became the UNESCO statement.

VI. TECHNOLOGY AND CHANGING FACULTY ROLES

A. One Union's Response to Technology: A True Dilemma

B. Beyond Technological Determinism

TECHNOLOGY AND CHANGING FACULTY ROLES

A. ONE UNIONS'S RESPONSE TO TECHNOLOGY: A TRUE DILEMMA

Terry Jones, President
California Faculty Association
and
Gerie Bledsoe, General Manager
California Faculty Association

INTRODUCTION: FEAST OR FAMINE IN CALIFORNIA?

As technology expands around the world, the cost of maintaining state of the art computer technology is increasing beyond the normal resources of most public higher education institutions. In fact, the Rand Corporation in Santa Monica regularly reminds us that California cannot meet the basic needs of the numbers of students coming to higher education over the next fifteen years --a demographic event we call "Tidal Wave II."[1]

To be competitive while providing a solid education, it is assumed that any good university or college must afford its students easy access to high technology. Reportedly, some campuses in the California State University (CSU) system and elsewhere in the country may be falling behind in their efforts to stay current.[2]

The CSU is a teaching institution, comprising twenty-two campuses (soon to be twenty-three) and 380,000 students. As such, the state has not invested sufficiently in the CSU's technology infrastructure. The University of California (UC) performs the research mission in the state according to state statute, the famous Master Plan for Higher Education. Most of the federal and state funds for major computing equipment and telecommunications have gone, of course, to the UC system.

However, today there is an obvious need for the CSU to have a vastly improved technological infrastructure. Its students and faculty must have improved access to major computer resources. The question becomes who will provide the necessary funds? The CSU administration is convinced that the state legislature will not provide these funds. CFA does not believe that the CSU administration has done an adequate job of explaining the university's technological needs to the public and its representatives in Sacramento.

In fact, the CSU has failed to keep up with the UC and our comparable institutions in a variety of ways. First, the CSU has also failed to keep up in relative terms with the UC in faculty compensation. Because of three years without any salary increases during the state's 1990-1995 economic recession, the CSU fell at least 7.4% behind comparison institutions in faculty salary. CSU faculty need at least a 11.2% salary increase next year to catch up with their peer institutions, according to the California Post-Secondary Education Commission (CPEC).[3]

In contrast to CPEC's finding, the administration has offered only a 4% increase in compensation, plus the possibility of a 1% special "augmentation" from the legislature for merit pay. Our new chancellor, Charlie Reed, has also offered a vague plan to close the CPEC salary gap in four years.[4] In contrast, the UC plans to achieve parity among top research institutions next year for its faculty.

Second, the CSU has not been able to maintain its physical plant adequately. It is estimated that the CSU needs $300-500 million to take proper care of its buildings—not counting the technological infrastructure. Like most universities largely built in the 1960s, the average CSU building is more than thirty years old and clearly shows it age and years of neglect.[5]

Third, the CSU has not maintained the necessary funding to support its enrollment. This year the CSU is educating 8,000 students for whom it receives no support from the state government. There is some hope that this situation will be remedied next year. The University has asked the Governor and legislature for an additional $39.6 million for enrollment growth. It seems likely that the funds will be appropriated.[6]

Finally, student fees were increased significantly in the state during 1991-1995. The legislature has recently made some modest reductions in fee levels, and efforts were being made to implement a policy that will tie fees in the future to increases in family income. California has moved far away from the concept of no tuition for higher education students.[7]

But wait, we are talking about California, the Golden State, here. We all know that if California were an independent country, it would have the seventh largest economy (GNP) in the world. The economic depression of the early 1990s is over. The state's financial surplus next year may run as high as four billion dollars! Why should we worry? $300 million for technology should be easy to find.

Yet we are told that the economy will have its good and bad moments. There are few who expect this boom to continue long. Remember, the Rand Corporation says that the state will not be able to pay for its universities over the next two decades, even with an improved economy. And then the Republicans instinctively want to eliminate any surplus by reducing taxes on the rich.

In this context, what happens when someone comes along and appears to offer you $300 to $900 million—for free—to rebuild the CSU's technology infrastructure. Such a deal! It initially sounded good to many administrators, faculty, staff, and students who lack sufficient access to technology. Yet, as initially proposed, the deal immediately raised the question, as stated by one Trustee in public session: "is there such a thing as a free lunch?" But even as he asked the question, we could hear the CETI Express, the "California Educational Technology Initiative," building up a head of steam.

CETI: A FREE LUNCH OR BAD BUSINESS?

In September last year (1997) the CSU faculty were informed by (former) Chancellor Barry Munitz and the Board of Trustees that the CSU was about to become a partner in a joint venture with Microsoft, GTE (the phone company), Hughes Electronics, and Fujitsu, a $35 billion-a-year Japanese company that makes all sorts products, including telephone switches and PC computers. Never in the history of American higher education had a public-private partnership of this magnitude been proposed.[8]

Of course, Dr. Munitz and the Trustees promised ample consultation with the faculty, staff, and students. But we were also given the impression that the new partnership was a "done deal." In fact, we could hear the CETI Express chugging down the tracks.

The partnership planned to raise $300 million to "build out" the CSU technology infrastructure by selling bonds. It would provide every thing from desktop PCs to fiber optic wiring and high-speed telephone switches. We were also told that it would return $100 million each year to the CSU to "refresh" (upgrade) the system for ten years. In addition to hardware and wiring, the CETI partnership would provide service to maintain the system and to help people use it.

It all sounded good until the CFA and some campus academic senates started asking questions:

- Who would put up the initial $300 million and who would pay it back if the partnership failed?
- How would the money to update the system be generated?
- What would it cost the faculty and students?
- What impact would it have on the curriculum and faculty workload?
- To what degree would public property and jobs be privatized?
- Who would control it?
- And the initial question remained: could there really be a free lunch?

Without much ceremony or consultation, the faculty was asked to accept the partnership. The California Faculty Association (CFA) and academic senates at several of the CSU campuses went quickly from dubious to outright skeptical. It soon became clear that the partnership would charge faculty members a nominal fee for Internet access, and students would pay for their expanding use of the Internet.

The new telecommunications system would be owned by the partnership, which would also be marketing local telephone and Internet services to off-campus customers.[9] On other topics, CETI representatives did not have solid answers to many fundamental questions, especially those from business school professors who know about junk bonds, business plans, and exotica like that.

CFA was also concerned that the "profits" made by the partnership would give the legislature a good excuse to reduce the university's budget. To be sure, many legislators were either surprised or concerned by the proposal, since they, too, had not been consulted by the Chancellor.

When CFA and others asked these questions, the response from Chancellor Munitz was both petty and threatening. He asked curtly, where does the union propose to obtain the funds needed for (1) faculty pay increases, (2) maintaining the buildings, (3) keeping student fees low, and (4) high technology? It was a tough question for CFA. It posed a dilemma.

Should CFA oppose CETI and be blamed, perhaps, for increasing student fees and continuing the decline in the university's ability to meet it technological needs? Or should we approve selling the university's soul to Mammon? The Chancellor clearly attempted to divide the students and faculty on the issue. His effort succeeded eventually, because of the student's concern about fee increases.

Naturally, CFA suggested that the Chancellor first ask the governor and the legislature for the funds, before making a deal with Bill Gates and Microsoft. Needless to say, the Chancellor was underwhelmed by our proposal. After all, what does the faculty union know about state finances and exotic business partnerships? Munitz reminded us that the CSU had unsuccessfully asked the legislature for technology funds in 1996 and 1997.[10]

Well, CFA does have a few friends in the legislature. So we took the CETI proposal to them and asked for a public hearing. In these hearings, we found that several legislators were not only dubious and skeptical about the proposal, but also outwardly hostile.

CFA also asked a friendly senator to send the item to the Legislative Counsel's office for an opinion. CFA's own legal research was soon confirmed by a lengthy written opinion from the Legislative Counsel. As originally designed, several aspects of the partnership appeared to unconstitutional.[11] With the prospect of imminent litigation would our CETI partners agree to launch the enterprise?

Legislators also learned that Microsoft's and Fujitsu's competitors, which included Apple Computer and most of the Silicon Valley, were extremely annoyed by being left out of the deal. CSU had brought thousands of Apple computers, and by pursuing CETI, CSU was announcing to the world that it was moving completely into the PC world.

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Thus, CETI took a licking in the January legislative hearings and was knocked off the fast track. While it was unable to stand public scrutiny, its supporters quickly stated their resolve to return with a new, better plan. Relations between CFA and the CSU administration reached a new low.

Since January the Chancellor Reed and his staff have been trying to turn the concept of CETI into something that is financially viable on paper and less threatening overall. Apparently, the task ("heavy lifting" in Reed's terms) has been greater than was anticipated. We were promised a new plan in April, but it has not seen the light of day. We have recently learned that it probably won't be ready for public discussion until September.

The CETI Express may be side tracked or delayed somewhat, but we believe it may yet build up a head of steam and coming barreling down that track, attempting to roll over its critics. We hope that Chancellor Reed will not be so foolish. He needs the faculty's support to make this project work for the university and its students.

BUT WHAT'S A UNION TO DO?

CFA is not opposed to high tech, as much as we support the concept of "high touch" education. Many CFA leaders are innovators in "mediated" instruction. But we are a teaching institution, where classrooms for thirty or forty students are the norm.[12] With 20,000 faculty and a student/faculty ratio of around 20:1, the CSU is a labor-intensive institution. CFA believes that there is no adequate substitute for a real instructor in a class, although technology may facilitate learning in and outside of that classroom. We stand firmly with the Academic Senates that the faculty should have primary responsibility for the curriculum.[13]

The Rand Corporation recommends that technology be used to make the CSU more efficient and productive.[14] We believe that this is only marginally possible. Distance learning with any concern for quality is everywhere more expensive than conventional instruction. We are more concerned that some planners see computers and video equipment replacing full-time faculty in the classroom. However, we do believe that technology is integral to the education process. CFA has always been willing to meet with the CSU administration to explore the proper use of technology, including distance learning.[15]

Like most people, the faculty want to have their cake and eat it, too. As Samuel Gompers' said, we want "more." CFA wants more money for salaries—to catch up and stay even with comparable institutions. We want more course sections for our students, along with safe, clean buildings; more books in the library; modern labs, and more access to technology. A computer on every faculty member's desk is still not a reality. For our students we want more quality and access to higher education, low tuition, and the good life!

Yes, we want more faculty development funds. Specifically, CFA wants the faculty to have the opportunity to learn more proficient uses of technology. And we want more technology without charging anyone user fees. We also want the faculty to receive appropriate assistance in order to be better prepared to deal with the increasing diversity of our student body.

Yes, CFA wants more money from the governor and state legislature. We want more for the faculty and more for our students. We remained convinced that for "more," we will return more dividends to the state of California for generations to come. For every dollar spent on higher education, four will return to the state's economy. The campus, not prisons, remain the best place to invest the public dollar.

CONCLUSION: SEARCHING FOR A PROPER MODE OF CONSULTATION

The CETI proposal raised the issue of what constitutes adequate consultation between the union and the CSU administration over such matters. There is a history of suspicion and non-cooperation between the two parties, and the debate over CETI indicates there may be no end in sight to this poor relationship, unless the new Chancellor wants to reach out and engage CFA. There were numerous issues involved in this project that are clearly within the scope of bargaining or consultation in California. But we were not consulted until after CETI was formally announced, and the parties have never had a formal meet and confer session on this matter.

Of course, the CSU administration tried to paint CFA as being anti-technology and anti-student. But nothing could be further from the truth. CFA has strongly supported improved access to, and application of, technology—in and out of the classroom. CFA is not opposed, in principle, to the concept of public-private partnerships that are good for the faculty, staff, and students. CFA does have many members, of course, who are opposed politically and philosophically to these types of partnerships.

CFA's complaint was initially about the process by which CETI was developed, and CFA's exclusion from this process. How should CFA and the Chancellor's Office work together on a plan as vast as CETI, especially when trade secrets may be involved? How should this consultation be structured? Instead of making an effort at consultation, the Chancellor ignored CFA. Like the rest of the faculty, CFA leaders were told to fall in line, for the "good of the university."

As a faculty union, we are opposed to the "father knows best" method of administration and demand that we be full participants in any planning as monumental as CETI. It seems that we have gotten the new administration's attention. They have now engaged us in the discussion of CETI's future. Perhaps we can help put CETI on the right track. However, to do so will require a more mature relationship between CFA and the Chancellor's Office. Our questions about CETI must be answered to our satisfaction. The faculty, as represented by CFA, must be seen more as a partner in the process. And CFA must be more forthcoming about the terms and conditions under which we could support a partnership of the magnitude of a CETI. Most importantly, the Chancellor must earn the faculty's support and enthusiasm for CETI, because without it, such a project is doomed.

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[1] Council for Aid to Education, "Breaking the Social Contract, " The Rand Corporation, 1997. The image of a tidal wave may have been misleading, perhaps "rising tide" might have been better. There is controversy in California and other states about projected enrollment growths. CSU is planning on an average annual increase of 1% in enrollment over the next decade. At this rate, it must find space for another 70,000 FTE students. Overall, Rand projects that higher education institutions must increase its capacity from 1.3 million FTES in 1997 to 2.0 million FTES in 2015. This is expected to cost the state $13.6 billion more for higher education; a cost it will not be able to afford (p. 15).

[2] Since 1989, CSU campuses have been given a fair amount of autonomy about how they spend their funds. Most have invested wisely in technology, given the limited amount of funds available. Others had postponed spending on technology, thus creating a system of "have" and "have not" campuses in technology. Also, the first campus that attempted to impose a special technology fee was unsuccessful, when a student referendum voted against it. Now the "have nots, " like LA State, are supporting CETI.

[3] CSU faculty salaries are compared annually to the salaries of twenty other colleges and universities around the country. This comparison is conducted by the California Post-Secondary Education Commission (CPEC) and reported annually to the legislature. The UC has a similar arrangement, but with a different set of institutions, of course.

[4] Each year the University proposes to the Governor a budget that includes sum of money for employee compensation increases. This budget is proposed before bargaining takes place. Never in the CSU's recent history has the final faculty pay increase been greater that the amount of funds initially requested. However, this year and last the Chancellor did agree to seek a special, additional appropriate from the legislature of one percent for faculty and staff salaries. Last year, the attempt failed. This year, CFA may not know until September if these additional funds--about $9.6 million for a 1% increase in faculty salaries--will be appropriated.

[5] CSU, "1998/99 Support Budget," The California State University, (November 1997), p. 45.

[6] CFA and the Statewide Academic Senate convinced the CSU Statewide Budget Advisory Committee to recommend to the Chancellor that $39.6 million be added to the budget request in 1998-1999 for unsupported enrollment. The Chancellor and Trustees accepted this recommendation, which also was approved by the Department of Finance and the Governor. This amount is now part of the budget pending legislative action.

[7] Chancellor Barry Munitz, when faced with the economic recession of the early '90's got the Trustees to adopt a policy that student fees (tuition) should increase to pay one-third the cost of a student's education, with a similar percentage going into student aid. This policy saved some full-time faculty jobs during this period, but also tended to reduce enrollments. The Democratic majority in the legislature first stopped and then reversed fee increases by giving the University additional funds in lieu of the increase ("backfilling") and most recently by a mandated 5% reduction in fees, which was also backfilled.

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[8] CETI emerged from a yearlong study of technology needs on campus and a close relationship between members of the Chancellor's staff and GTE. To negotiate the initial concept of a partnership, those involved in the talks were required to sign a pledge of confidentiality because they would learn, supposedly, certain business/trade secrets. This did not set well with many faculty, who suspected some unholy alliance between the "People's University" and corporate America. The fact that Chancellor Munitz came directly from a company infamous for logging redwood trees and the savings and loan debacle did not endear him to many CSU faculty, either.

[9] GTE signed such an arrangement with the University of Southern California in the spring of 1998. See the LA Times for details.

[10] During the 1996-1997 legislative session, the Chancellor requested a special 1% augmentation of the CSU budget for technology and employee compensation. The legislature did not approve the funds. This event was used as part of the rationale for CETI.

[11] The opinion focused on part of the constitution that prohibits control of education or similar matters from being taken out of the hands or control of public agencies. The Legislative Counsel found several areas in CETI where this might be a problem.

[12] The CSU is an institution built completely on the 25-40 student per classroom paradigm. On most campus there are no--repeat no--classrooms that will hold more students. This is especially true on the smaller campuses. But even a larger, urban institution like San Francisco State was forced to rent a movie theater to offer large classes. Only San Diego State has a fair number of larger classrooms. The ubiquity of small classrooms makes it difficult in the CSU to reduce the cost of instruction by moving to larger classes.

[13] The initial CETI plan proposed that the delivery of certain forms of instruction be conducted by the new partnership. This raised an immediate concern on the faculty's part about control of the curriculum. Although the proposal was confined to corporate training programs, it was dropped from later versions of CETI. The concern over CETI's role in the delivery of instruction continues to stimulate faculty opposition to the whole project.

[14] Rand Report pp. 18-19.

[15] CFA and the CSU have negotiated an intellectual property agreement, but have not yet addressed the impact of mediated instruction/technology on the faculty's terms and conditions of employment.

TECHNOLOGY AND CHANGING FACULTY ROLES

B. BEYOND TECHNOLOGICAL DETERMINISM

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New technologies, in particular those related to communication and information management, will almost certainly have an enormous impact on university faculty. Exactly what that impact might be, however, remains quite unclear. My unwillingness to specify outcomes grows not from an academic's sense of caution, but from the host of contradictory pressures that will influence the development of higher education technology and the larger enterprise of higher education itself.

Let me come clean at the outset: I am a big fan of the potential of new technologies in higher education. I use them constantly, have been closely involved in the development of campus-based applications here at Baruch, and spend a good deal of my time helping others to use them effectively. Attached to the appropriate curricula and used intelligently, they can enhance almost every aspect of collegiate education. On the other hand, I am keenly aware that new technologies can be used ineffectively. They may very well create unprecedented pressures on faculty and institutions, and can serve -- particularly when poorly understood -- as a rationale for damaging the educational enterprise that many people in this room have devoted their lives to protecting and advancing.

I will speak this afternoon about just two signal pressures that faculties and administrations will feel to adapt classroom practices to new technologies in a very volatile environment: the need to counter competition for the college-goer's dollar and the need to show that investments in computer technology produce results. In each case, I will draw implications for faculty workload. I am not here advancing the case that some of the more radical impacts on instruction that I will describe below are necessary outcomes of the introduction of technology. On the contrary, I wish to argue that there are heretofore under-examined common interests between administration and faculty, and in particular that the need to maintain institutional integrity provides a strong incentive for administrations to become sensitive and creative in designing faculty compensation and workload.

The discussion is predicated on three basic assumptions about what these technologies can and cannot do in and of themselves. I will outline these basic assumptions before moving into the body of the presentation.

1. **Technologies do nothing by themselves.**

Technologies do not require any particular pedagogy or academic structure. A given technology can make certain models easier to accomplish and others harder, but they do not themselves demand one, specific approach. The paperback book is a technology that has proven itself enormously flexible and adaptable to any number of pedagogies. Pens, letters and memos undergird workflow in academic structures as diverse as Oxford's tutorials and Audrey Cohen's "Crystals." Similarly, the computer can sit at the center of self-taught, software-driven pedagogical model, or it can serve as the means for rich, highly interactive student-to-student and student-to-faculty communication. It can be used to divide a professor's tasks into discrete segments performed by several individuals for any one class, or it can be used to unify a single professor's role by reducing the time spent on course administration and allowing proportionately greater attention to a proportionately greater number of higher-order activities.

2. **The changes associated with technology are often oversold with respect both to their novelty and their projected impact.**

Consider the case of distance education. Distance education has been possible since the development of the first postal system. Self-directed study can exist quite nicely without computers, a point the Teaching Company reinforces every time it promises to send us video- or audiotapes if we "can't get to Dartmouth to study Shakespeare."[1] Computers and high-speed data networks can make the process much richer, much faster, and much more elegant, but we can do similar work without computers. Further, computers have yet to prove themselves greatly more successful gateways to higher learning than the hoarier technologies of the post office. After initial interest in the technology wanes, how do computer courses sustain student interest more effectively than mail order? There are good answers to questions of this sort, but it's not a slam dunk, and we don't have a lot of information about the long-term behaviors of individuals and institutions in networked learning situations of the sort projected by the NLII and other groups.

3. **Successful use of technology requires considerable investment.**

A technological infrastructure requires tremendous investments in many perfectly obvious ways and many non-obvious ways. Machines cost money at the point of purchase, they require maintenance once deployed, and they must be upgraded at intervals that brook little compromise if an institution wants to keep up. Shrink-wrapped software also requires significant investments, and those investments often pale in comparison to the costs of software developed in-house. Every student and faculty computer needs to be connected to the Internet, requiring extensive local wiring and expensive relationships with providers of connections and data. Less obvious or perhaps simply more easily ignored are training costs for students and faculty alike. Corporate America has been much more effective than academia in ensuring that employees expected to use technologies actually receive training in how to do so. Failure to provide such training up front saves in short term costs, but exacts a price elsewhere in the expense equation as technologies fall short of their expected impact due to slow adoption and ineffective application.

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[1] The Teaching Company advertises extensively in many magazines. The advertisement from which this quotation was taken ran in the *New York Review of Books*, 45 (March 5, 1998), p. 52.

With these points in mind, let me outline what seem to me to be the forces most insistently demanding a response from faculty and administration alike. I am assuming, for the sake of argument, that computer based information and communication technologies will become involved in a larger and larger share of course delivery. Where possible, I will reflect on my own experience as a teacher who has tried to do some of these things with varying degrees of success.

UNIVERSITIES FACE COMPETITION FROM ALTERNATIVE DELIVERY MODELS

Many observers (e.g., Twigg & Oblinger; Massy & Zemsky) have pointed to several challenges to the university's hegemony in higher education, including the growth of a) corporate training such as Boeing's engineering program, b) "credit banks" that collect information about credits students have gained from disparate institutions, bundling them into something resembling a degree, c) technical programs such as the DeVry Institute, and d) new institutions following academic models, such as the University of Phoenix and the Western Governors University. The promise of such institutions is an education suited to a very particular audience, ease of access and scheduling, a less restrictive set of requirements en route to whatever certification the program provides, reduced cost, or some combination of the above. With a larger and larger percentage of the college student population represented by adult learners not matriculated in traditional degree programs, these alternatives are almost certain become more appealing and more numerous.

Colleges can respond in several ways. They can offer courses similar to the competition's programming, relying on the prestige of established academic reputations to sell their offerings. Alternatively, they can cleave to the degree model, defending a broader, more integrated (and demanding) model of education as the best way to meet the needs of the market. Or they can find a middle road, offering a wider variety of course packages but not going as far down the mix-and-match road as the credit banks.

Direct competition will pressure administrations to rely more heavily on technology as a mode of delivery for two reasons. First, technology promises greater comparability with the competition. The Western Governors University, for example, will be almost wholly reliant on computer-based delivery of course content. Students who become accustomed to the delivery system will look for something similar from all providers. Second, the technology offers the prospect of breaking past the traditional geographic boundaries that constitute the informal catchment areas for adult learners.

Faculties will have to decide to what degree they wish to take ownership of these new curricula. In some cases, administrations will make their decisions largely irrelevant by placing such programs in schools of continuing studies or other areas of the institution over which faculty have little statutory control. In other cases, however, and in every case where an administration wishes to offer accredited coursework leading toward a degree, the faculty will have to determine how to integrate these distant offerings with the extant curriculum. The calculus here should be strategic as well as academic. If faculties decide en masse that they have little interest in participating in these programs, ceding them instead to the part-time professorate, they commit themselves to a shrinking proportion of the student market even if the appeal of the traditional degree path holds up among traditional college-goers. This proportion could shrink more rapidly should 18-24 year-olds decide along with their graying counterparts that "just-in-time" models of education make sense for themselves as well, choosing to seek narrower job skills rather than broader, liberal educations.

The cultural struggle, however, should not be underestimated. Faculties will be, for at least a time, hard-pressed to serve two different markets with two very different sets of expectations. One group of students will look for the traditional college experience, requiring professors to focus their efforts on the preparation of whole courses in which they meet with students, collectively and individually, several times each week. Another group will look for a guide who can help navigate a large quantity of course materials available online – in many cases assembled by someone other than the professor of record – and provide useful summative and formative evaluation during the study period. The professor attentive to the second market will have fewer formal office hours, but spend more time responding to e-mail. She will spend less time preparing lectures, but more time reviewing materials. Trying to serve both models simultaneously will require unprecedented flexibility on the part of the faculty, and the evolution of new work routines to support the disparate requirements of teacher-directed and student-directed learning.

While the traditional model provides faculty with more *face-to-face* contact with students, it is not necessarily the case that it ensures more sustained *academic* contact with students. On the contrary, a student participating in a well-structured distant-learning experience may have much more opportunity to communicate with the instructor than do traditional students. How many of us sat in large lectures listening to the famous professor speak, but never once having an opportunity to show the noble don so much as a paragraph of our own work? In a small-class, single-instructor distant model (though not in a large, multi-section distant model), students might well have assignments prompting contact with the professor several times each week. Some of these contacts could be formal, others quite casual. The point is that the student initiates and/or responds to more personally directed communication.

Herein lies another choice. The richer models of distant learning require a great deal of faculty time for evaluation. I use what could otherwise be a distant program with my face-to-face classes. Students submit all of their assignments to a public message forum and comment on one another's work. I comment as well. Using the message forums as a pre-submission area, I can ensure that all of my students go through a full-fledged drafting process before a single piece of real paper is exchanged, providing a wonderful learning experience for them and a much better way for me to help them over rough patches. But it takes much more of the professor's time than the lecture/write a paper/get a grade model of instruction.

I cannot make this point strongly enough: there is no saving of faculty time in a richly interactive instructional model, be it computerized or face-to-face. The computer makes much easier the humdrum process of distributing and archiving papers, and for good typists, it eases the process of commentary. It will, however, increase the students' sense that response is forthcoming, producing proportionately greater frustration when responses are missing or delayed. There are possible savings in course development and preparation (e.g., identification of core texts and lesson plans, shared assignments, etc.), but most of these would have to be refreshed repeatedly and the oversight problems that plague large lecture classes with multiple recitations would be no different online than face-to-face.

If administrations are to be realistic about the tradeoffs inherent in such a model, they will have either to a) accept that there are no time and/or per-capita FTE savings in computerized models, or b) attempt to rebalance expectations for faculty workload. The first option, "doing more with more," is unlikely to sit well with administrations eager to cut costs. The second option would probably involve moving some faculty toward a "heavy-contact" model while others are allowed to focus on curriculum and materials development. The notion of disaggregating faculty roles is prominent in the literature on computer-based education, and one I shall address in the next section.

WIDESPREAD DEPLOYMENT OF TECHNOLOGY WILL PRESSURE ADMINISTRATIONS TO SHOW RESULTS

Administrations cannot continue to spend whatever they spend on technology without showing results. Costs savings, at least on an FTE basis, will have to be a part of that demonstration, but so might some effort to change the assessment of instructional effectiveness, and perhaps by extension, the effectiveness of instruction itself. I will deal with each of these areas in turn.

Saving Money. As noted above, simply putting a course online does not necessarily reduce the requirement for faculty labor. In many cases, it calls for more effort, not less. Consider further that computer-based classes will, at least initially, require a great deal more up-front investment in curricular materials as well as instructor and student training. Needless to say, these courses also require greater investments in hardware and bandwidth. Where then are the savings? They must come from either a relentless increase in FTE in the computer-driven courses, or a radical redefinition of faculty inputs.[2]

Disaggregated course delivery could take many forms, but the basic concept involves splitting up the traditionally unitary role of the faculty member and distributing elements of course delivery among several parties. One professor could be responsible for determining curricular content, another for assembling illustrative materials and readings. A technician could design interactive courseware and a bevy of adjuncts could deal with the students themselves.

For those of you quailing in horror, I must point out that this model is in concept little different from the mass lecture led by a senior faculty member and staffed by graduate students. We are all intimately familiar with the process. The professor lectures once or twice weekly to a large group. A smattering of students might have the opportunity to ask questions, but by and large, there is no interaction with the senior faculty member. Discussion takes place in the precept sessions conducted, again, once or twice weekly. Readings and assignments are centralized across sections, with the graduate students responsible for grading. Status and division of labor are clear.

Computer delivery of a course based on this model changes the basic dynamic little on a campus by campus basis. However, the availability of distant technologies makes it possible to mine status differences *across* campuses. Star lecturers can be recruited from leading institutions; local faculty would serve as preceptors for the discussion sections. Only now the discussion sections do not take place on Wednesday afternoon at 4:00; they occur asynchronously throughout the week as the local professor responds to student assignments and inquiries. Video conferencing or live chat could be scheduled from time to time to give the students a chance to interact with one another simultaneously (if still virtually), but such encounters need not take place in order to complete the basic work of the class.

Once a multi-campus model has taken hold, some of the basic barriers to outsourcing even more elements of the curriculum will have eroded. The "best" professors – wherever they may work – could decide what students should learn throughout an entire degree program at several colleges. Chosen for their superior command of their fields and their presentational skills, they could save every institution from having to hire its own full-rank faculty in every position. Those of faculty rank who do remain could be redeployed to tasks other than curriculum development (i.e., more teaching, training less senior faculty, etc.). The line teaching force could be comprised largely of graduate students and less accomplished faculty saddled with fewer responsibilities and lower rates of pay.

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[2] I am considering here the costs of delivering classes per se; there are other savings – in student information management, advisement, etc. – that could be realized in other segments of the campus. Vis a vis classes in particular it is also possible that savings could be recognized in physical plant were courses of this sort ever sufficiently popular to abandon pieces of the campus. At an urban school such as Baruch and many of our sister campuses, this might be a legitimate option, but at most institutions, it would make little sense. Rented facilities could be let go, but owned facilities would remain; depopulating would save little of their overall cost and selling them off is unlikely to be a realistic alternative.

This is a grim scenario for most institutions and most faculty. Happily, I think the intra-campus model unlikely to be adopted on any more widespread a basis than present-day mass lectures, and examples of the inter-campus model to be, in the short run, few and far between. The inter-campus model in particular raises nettlesome questions about who owns courses and the legitimate interests of institutions in preventing their dissemination beyond campus walls.

Let us assume that a famous professor from Harvard is asked by the City University of New York to create a basic course in American history. CUNY will remunerate the professor handsomely for basic course design, identification of materials, and videotaped or videoconferenced lectures. The professor is also responsible for providing periodic updates to the course, as well as designing training packages for local faculty who will interact directly with the students. Harvard's reaction to Professor X's consulting is unlikely to be favorable. His consulting dilutes the uniqueness of the Harvard degree, making their investment in the professor proportionately less valuable. The university's reaction might be even less favorable were the competitor Boston University, or Tufts.

These conflicting institutional motivations suggest on the one hand a slower and less complete transition to the centralized model than some predict, and on the other, a series of opportunities for negotiation between administration and faculty. Unless and until faculty contracts explicitly forbid the sale of services to competitors, faculty can disaggregate their own skill sets for sale to the highest bidder. Today's faculty member competes for tenure and promotion on the basis of an integrated suite of skills including all three legs of the traditional stool. If universities do embrace disaggregation, that should no longer be necessary. Great lecturers can hang out their lecturer's shingle. Curriculum specialists – awful teachers, but good conceptualizers – could have rewarding careers moving among campuses and updating syllabi. Faculty involved in pure research are already accustomed to competing for positions on this basis.

Present faculty contracts do not typically restrict faculty consultation with competing educational institutions, but rapid acceleration in scenarios such as the above may change that. Harvard does forbid faculty from taking permanent appointments at other institutions (*Chronicle of Higher Education*, 09/26/97A13). It is a small step from there to attempting to ensure that prestige faculty do not lend their names to instructional programs that the home university would like to brand for itself alone. A close analogy could be made between this form of academic employment and the increasing prominence of licensing agreements in software distribution and academic publishing (Okerson). Academics could market select capabilities to a range of clients on a contractual basis. Forcing an academic to give up that right would require payment of a premium. Annette Okerson argues that licensing suits the presently unsettled world of academic publishing well. The nature of academic employment may take a similar path for much the same reasons.

Failure to exploit the common interests shared by administrations and faculty could result in much more profound transformation of course delivery. Those who argue that much of the curriculum simply conveys "codified knowledge," expect that a significant chunk of the typical college curriculum can be radically altered by unbundling faculty competencies with little threat to institutional prestige. Basic instruction in foreign languages, mathematics, biology, physics, and other core content areas have been mounted on well-designed self-instructional systems. Rensselaer Polytechnic Institute does this now in its studio physics, calculus and chemistry courses. Massy and Zemsky have modeled the same sort of delivery system for microeconomics classes (Massy & Zemsky). Any field reliant on highly codified knowledge is ripe for translation into this mode of course delivery.

I want to be clear that I am not advocating heavy technological intervention in these fields; I only point to the rapid accretion of programs designed to serve such needs. Disciplines that focus at an early stage on content rather than on process concerns may be more vulnerable to this sort of reconstruction than disciplines that emphasize the endless varieties of student production. That "codified" fields can sometimes benefit from highly interactive, creatively oriented instruction is not called into question here. However, because many courses in the fields mentioned above already limit the creative authority of individual faculty, seeking to provide a base of knowledge in a strictly sequenced and demanding curriculum, they are ripe for reframing through technologies that better assure course developers of (at least the semblance of) control over delivery.

Faculty in the affected courses may have a hard time arguing against this model. The software is good and getting better, and the financial incentives to compete on product for a $125-$250 billion education market are enormous. Investments in these areas are likely to be massive and pervasive. On a per-class basis, the savings they achieve are insignificant, but converting an entire basic language or engineering curriculum to online delivery can save an institution untold sums now spent hiring dozens of faculty to teach scores of sections of the same course.

Such systems could entirely supplant classroom instruction in a host of first-tier courses. "Live" content would be reduced to infrequent tutorials for students having trouble with their lessons. Consequences for the professional standing of faculty who do the bulk of their teaching in these and remedial classes are plainly dire. Graduate students who fund their educations as teaching assistants in classes of this sort may well be forced to compete for a smaller number of tutorial support positions. There may not even be much in the way of local options for online curriculum development. Economies of scale make it likely that the overwhelming majority of the investment in basic course design be placed into nationally and internationally replicable instructional software.

Evaluating Outcomes. Computers carry with them the ability to distribute student work instantaneously and to archive it conveniently. This could give rise to a new evaluation regime that channels the pressure for outcomes assessment common among virtually all academic credentialing organizations into a computer platform that promises an easy fix.

I am highly skeptical of claims that computer technology in its present form will have a radical impact on assessment of content by themselves and per se. Computers can speed up the process of evaluating objective test items, but they cannot comment competently on an essay. They can provide instantaneous – and extremely useful – feedback to students taking practice exams, but they cannot tell an ESL student why a given colloquialism that works well in Chinese has no place in English. They can route student work to "neutral" graders, but we could do that through inter-office mail as well, the computer adds only convenience to the mailing and tracking.

Stephen C. Ehrmann makes the larger point that we don't yet fully understand how to baseline computing's contribution to the educational process, or how to control for the variables in a non-computing classroom. The Director of the Flashlight Project, a prominent program for technology diffusion in higher education, Ehrmann urges that we focus on process variables rather than outcome variables in the sense of specific achievements. In other words, he would prefer to see inventories of activities, records of work accomplished, and detailed descriptions of assignments rather than comparisons between grades garnered under different models or marks on individual assignments. Whether or not institutions subsequently move on to an assessment of summative outcomes such as grades, a clear understanding of the instructional routines germane to computer-based instruction – a field still very much under development – is plainly necessary before measures of success can be firmly and reliably established.

To this end, computers can radically expand administration's ability to account for process and scrutinize faculty effort. When classroom activities are stored on a central server – as mine are right now – student *and faculty* efforts can be monitored more easily by the administration. Available for all to see is the number of assignments and the kind of commentary I provide. The system administrator can observe how I conceptualize my courses, what kinds of illustrative material I use and how demanding I am of my students on given questions.

In the system that we have designed here at Baruch, question sets are searchable not only by administration, but by other members of the faculty. The idea is to save each one of us from having to conceptualize courses in a vacuum. By gleaning ideas from one another, we make all of our courses stronger. There is of course a free-rider problem, but even there, if we assume that the free riders are picking up on useful course techniques, the result is wider dissemination of better lessons and better assignments.

Still to be resolved is how administrations might use pooled data of this sort to effect faculty review. It is fairly easy to imagine that faculty could be held to providing a given extent of commentary measured by word count, or a given number of assignments. Students appealing grades have an extensive record of exchange to refer to, and we can be fairly certain that logs of this sort will become discoverable records in personnel proceedings.

These developments may well be positive to the extent that they foster increased attention to the process of educating students. It allows everyone involved to get a better sense of the relationship between a catalogue description and what happens to students in the class. On the other hand, if the quantitative features of oversight are emphasized more than the qualitative features, networked learning could become for faculty a very expensive and detailed means of punching the clock.

CONCLUSION: ENGAGEMENT IS CRITICAL

Members of the faculty fearful that technology will undermine their role in the academy have every right to be. If they cede development of technical platforms to those who do not share their values and fail to offer realistic alternatives to some of the very real benefits of a "faculty-lite" model of technology diffusion, that outcome is much more likely. Faculty are well advised to incorporate new technologies not to remove themselves from their classes and their students, but to show how such technologies, properly understood and employed, can enrich the personal contact so important in liberal education.

The fact that administration and faculty interests are in many ways linked at the institutional level is a bright spot in projecting future developments. "Branded" schools cannot afford endlessly to dilute the brand, and that means striking some accommodation with faculty in return for removing their services from an open course development marketplace. Administrations should recognize that short-term cost savings, if they do not buttress the core mission and reputation of the institutions they serve, could rapidly turn into a rationale for diminished enrollments.

Whatever the specifics of a response, Colleges and universities will be under increasing pressure to show that they can do the job better than the Teaching Company, better than Boeing, and better than Microsoft can. That will never happen for administrations or faculties that simply stand pat and ask 21st-century students to embrace 19th-century teaching models. The professor has to join the programmer to protect the best interests of both.

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VII. DISPUTE RESOLUTION TECHNIQUES IN HIGHER EDUCATION

A. Mending the Cracks in the Ivory Tower: Strategies for Conflict Management in Higher Education

DISPUTE RESOLUTION TECHNIQUES IN HIGHER EDUCATION

A. MENDING THE CRACKS IN THE IVORY TOWER: STRATEGIES FOR CONFLICT MANAGEMENT IN HIGHER EDUCATION

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"I don't think they play at all fairly, Alice began, in a rather complaining tone. And they all quarrel so dreadfully one can't hear oneself speak—and they don't seem to have any rules in particular; at least if there are, nobody attends to them—and you've no idea how confusing it is..."

from Alice in Wonderland by Lewis Carroll

No, this isn't about higher education, but it might sound like your reaction after a meeting in higher education. Conflict in higher education is not new. In fact, we can trace the history of higher education through the history of the conflicts.

In the Hellenic period, Pythagoras established the first institution of higher education in the Western world. Conflict caused the demise of the school when enemies of the school "suppressed it and dispersed its adherents". (Cowley and Williams 4)

The School of Isocrates began in 392, but did not survive. The first recorded evidence of administrator-faculty dispute is found in Isocrates' inaugural address where he "inveighed against those teachers who betrayed their high calling by coaching their students in verbal trickery and by inculcating low morals in general." (Cowley and Williams 7)

Aristotle's Lyceum, founded in 338 BC came about because of conflict. It was thought by many, including Aristotle, that he would become the head of the Academy when Plato died. This was not the case. And so Aristotle did what other conflicted administrators would do for centuries later. He left the Academy and Athens, later to return to establish another school.

Higher education has always had to deal with the intrusion of the outside world. Hadrian's mother, Plotina meddled in the affairs of the Epicurean school in Athens, and usually the emperors retained the right to select the occupants of the learned chairs that they endowed. The government dominance reduced the brilliance of the schools of the later Roman period, and at least one writer has attributed the eventual decline of Roman higher Education to increasing governmental control. (Cramer 209)

It is said that the University of Bologna was established because of conflict among four groups of people - the private teachers of law, the students, the merchants and the city officials. In fact, the faculty of Bologna organized into guilds - what might be termed early unions. At the time, some of the professors joined forces with the city government against the students, the common enemy of both and got the town to appoint them public professors. "...[A]s such, they received salaries from the public purse. This action led to the founding of lay boards of control to supervise their salary payments, and from this source American Higher education eventually derived its system of external control". (Cowley and Williams 45)

The first University in America was Harvard; first only because of a "town and gown" conflict. According to historian Edwin Slosson, "George Thorpe attempted to establish Henrico College in 1619 but the Indians soon put an end to his ambitious enterprise by scalping him and sixteen of his tenants" (81) The institution was founded as William and Mary in 1693, 57 years after Harvard.

Yale was founded in 1701, also because of conflict. In establishing the college, the tightly administered governing board consisting of ten ministers (nine of them graduates of Harvard) "strove especially to protect the new college from the infidelities occurring at Harvard, where John Leverett, who had become president in 1708, espoused advocacy of the newer, more liberal concepts of religion" (Cowley and Williams, 77)

Likewise, the University of Pennsylvania was established through a series of conflicts. In 1740 Benjamin Franklin and other citizens took over George Whitefield's "Charity School", renamed it "the College and Academy of Philadelphia" in 1755, and in 1791 it became the University of Pennsylvania. However, the conflicts within that institution were not over. In 1779, the legislature "commandeered the powers, authorities and estates of the College and assigned them to a new corporation which it chartered as the Trustees of the University of the State of Pennsylvania. It had revoked the college charter on the grounds that former trustees had proven hostile to the new government and that all denominations had not received equal treatment. "(Cowley and Williams, 81)

Conflict has come from within the academy from those we serve - our student body. From the beginning of educational time, students have rebelled. In medieval times they were forbidden to "shout, hiss, make noise, throw stones in class or deputize one's servant to do so." (Bishop 69)

We're a lot better off today than our forefathers in medieval universities. According to Morris Bishop in an article about the medieval universities, " The professor had to swear obedience to the students' rector (a student representative). If he wished a leave of absence for a single day, he had first to humbly request it of his students, then have the permission approved by the rector and the student council. He could not leave town without depositing a security for his return. He was forbidden to create holidays at his pleasure. If he failed to get five students for an "ordinary" lecture or three for an "extraordinary" one, he was declared absent and fined. If his popularity waned, he might bribe students to attend his lectures....He was fined if he skipped a chapter or if he postponed a troublesome question to the end of his lecture in the hope of submerging it in the bell's clamor. ...A committee of students kept close watch on him 'for his spiritual good'." (69)

Rebellion has, for centuries, been a part of the educational life of American students as well. In 1777 the president of Yale likened his students to: "a bundle of Wild Fire, not easily controlled and governed." (Stiles 209)

Students also expressed their displeasure with the faculty. "The students were wont to express their displeasure with their tutors by stoning their windows and attacking them with clubs if they chanced out after dark." (Fulton and Thompson 9) At Harvard, an eminent historian lost an eye during a food fight when a piece of stale bread hit him as he was departing the dining room.

Campus unrest has been around since campuses have existed in America. "During the nineteenth century, discontent usually focused on such issues as poor food, inadequate housing, and excessively strict parietal rules; thus it was generally apolitical and parochial." (Astin 17) Another author noted that they rioted because of the reportedly poor recitation methods of the professors, the stale curriculum, the rotting food and the "constant snooping of faculty members into their personal lives". (Cowley and Williams 107)

We could continue throughout today with a revealing and fascinating history of the role that conflict plays in institutions of higher education.

Conflict early in the twentieth century led to the establishment of faculty unions. In 1913, the MUP was born when Professor Arthur Loveloy and associates at John's Hopkins wrote to colleagues proposing the formation of a national professorial organization which would have as its purpose 'to promote a more general and methodological discussion of educational problems of the university; to create means for the authoritative expression of public opinion of the profession; and to make possible collective action, on occasions when such action seems called for." (American Association of University Professors, 1914, 458)

For many of us in the academy today, talk of conflict hearkens back to the 1960s and 1970s. Whatever the causes, the results of campus unrest was felt, and still is, throughout the country. "...from dramatic changes in student enrollments, student views, and student life to the revolutionary curriculum approaches..." (Astin, et al. 2)

THE PRESENCE OF CONFLICT IS NOT ALL NEGATIVE

Most of us who work in conflict management argue that conflict can be a positive experience. If there were no conflict it might mean that no one was blocking the changes that many of us feel are detrimental to the good of our academic world. If it were not for conflict, chances are pretty good that tenure would be gone for all of us, for example.

Conflict, or probably more accurately the acknowledgement of conflict, has increased in higher education because of the crises we all face. Twenty years ago - and perhaps even ten - problems were more easily hidden. If there was significant conflict within a department, that department could be divided into two. There was enough money in many institutions to do that. But not any more.

Many will argue that the existence of conflict is a good sign, indicating that the academy is dealing with problems and issues of growth and change.

Madeline Green said, "Though higher education is rooted in a tradition of debate and the free exchange of ideas, it is not clear that dealing with conflict, particularly the kind of conflict apt to become emotional, is one that institutions can deal with very effectively. The conflicts that can emerge from trying to create truly pluralistic environments are uncomfortable and may need to be so. The challenge is to create vehicles for dealing with conflict in an environment that is open to differences."

Conflict is something that many in the academy have learned to avoid, not to manage. At our institutions, we in this room, and our conflict management colleagues are certainly in the minority. Few people are trained in conflict management skills, and therefore few people know what to do when a conflict crosses their desk.

The purpose of Mending the Cracks in the Ivory Tower: Strategies for Conflict Management in Higher Education is to provide academics a practical, hands on guide. It is a "how to manual". My concept of the book was to provide a "mentor on a shelf" for anyone who is "up to their ass in alligators" and needs to learn ways to drain the swamp, to get out of the swamp, or work with others to figure out why they were in the swamp in the first place!

It is my hope that this is a gentle guide for administrators - and for faculty as well - to bring them into the awareness of and skills in conflict management so that our jobs are easier. In fact, one of my goals of my work in conflict management is to work myself out of a job. If everyone learns effective conflict management skills, then I, and many of us in this room, can "sit at home, read trashy novels and eat bonbons"!

What we in this book are proposing is seen by some as nothing short of a paradigm shift, a shift from power "over" where everyone is told what to do and conflict is managed "because I'm the president...or the dean..." to power "with", where we all work together to effectively manage conflict.

What is some of the wisdom gleaned from the pages of the book? While in this short time I cannot do justice to all of the contributions, let me review some of the "highlights". You have a handout about the book with the names of contributors (including Joel Douglas from the National Center) and the chapters they contributed.

Because many in academia do not have a grounding in conflict management, the book begins with the basics and an overview of the process of conflict management and it ends with the Holton Model of Conflict Management and the step-by-step process of Problem Identification, Solution Identification and Solution Implementation.

Dr. Gerald Graff from the University of Chicago, is the author of Beyond The Culture Wars: How Teaching the Conflicts Can Revitalize American Education and a contributor to the book. Graff argues that the assumption that has ruled the academy is "that academic conflict is inherently destructive, and that a major function of academic administration must therefore be to prevent or muffle it." (Graff 13) He also recognizes "It is not simply that these conflicts have become more antagonistic as academic culture has become more demographically diverse, and as many of the disciplines have turned reflexively inward to interrogate or problematize their traditional premises, and as the money has run out that once enabled administrators to buy off and appease clashing academic groups. Deepening the problem further is the fact that internal conflicts within and between academic disciplines have become increasingly difficult to disentangle from conflicts in the wider culture. Recent scholarly debates over the role of gender or ethnic identity in the arts, for example, tend to echo and merge with debates in the public sphere over issues of hate speech, affirmative action, sexual harassment, and gay rights." (Graff 19)

We in higher education are climbing down from the ivory tower. And that descent means that we are increasingly mired in the conflicts of the larger world as they infiltrate the academy.

Some of the conflict in higher education stems from people being "caught in the middle". Deans and especially department chairs are beholden to two masters. Department chairs are usually faculty first, and then administrators sometimes. And so they need to learn to find the balance between these two worlds and two often differing value systems. Walt Gmelch, the Director for the Center for Academic Leadership says that chairs need help "to find the balance between the potentially different value systems and to find ways to resolve the conflicts inherent in their position." (Holton xv) Their role has been described as sitting on the edge of a razor blade—not an exceptionally comfortable place!

One often overlooked aspect of conflict in higher education is the culture conflict. The world - even our formerly protected world - is changing. There are many who are trying to inflict the culture of the corporate world into higher education. Because these cultures are so vastly different, they do not fit together. The expectations of new professors at your institution may be different. It may, for example be harder for junior professors to get tenure, the rewards and perks that exist may be different from one department to the next, one division to the next. Conflict often fragments the academy into opposing "camps" and conflict management is made difficult. Ann Lucas, one of the country's leading researchers, writers and consultants in issues facing academic leaders, argues that being a team player in academia is something that has rarely been rewarded, that roles and responsibilities are not well defined and that we have different forms of leadership. In order to effectively manage conflict, she argues, the dysfunctional culture that exists must be turned around. Institutional change efforts must be made to create culture and climate of communication, vision and trust.

Clara Lovett, President of Northern Arizona University and educational leader, notes that, "like the proverbial physician who cannot or will not heal himself, the academy has built up a culture that is unwilling - but we hope not unable - to manage conflict effectively." (Holton xvi)

Lovett, an historian by training, says that a reason for our reluctance to understand and manage conflict may have to do with what she terms, "academic exceptionalism". "Just as historians of the United States have argued at times that this country's political institutions and culture are too unique to be studied in a comparative perspective, so have scholars of higher education argued for the exceptionalism of academic culture. However", she continues, "it seems to me that the proponents of academic exceptionalism have been more successful than the historians of American exceptionalism ever were. Academic exceptionalism shelters our institutions and culture from uncomfortable or unflattering comparisons with all other systems of higher education and also with all other sectors of our own society." (Lovett 114) She says that "academic exceptionalism and its overarching myths lead our institutions in quite a different direction toward minimalist and rhetorical definition of consensus, an avoidance or denial of conflict, and the choice of care-takers over risk-takers for leadership positions." (Lovett 116) Then she gives her views of academic leadership and how to manage the conflict that is inevitable.

It is also time for us in academia to realize that we are a system. No longer can academic affairs exist in a world unto ourselves. We now realize - or are willing to admit something that we realized long ago - that all areas of the institution are interdependent. That calls on us all - Student Affairs, Administration and Finance, Academic Affairs...on the faculty, the maintainers, the secretaries, the administrators the students—to work together. We finally are realizing that conflict in one part of that system effects all others. We are beginning to realize that the low pay and, often, lower appreciation of clerical staff lead to problems in the department. We are acknowledging that binge drinking on Thursday nights effects classrooms on Friday morning. And to manage the conflicts that ensue, we must work together. Lynn Willett, the Vice President of Student Affairs at Bridgewater State College and the President of the American

College Personnel Association, addresses this and calls for interdependence in managing conflict.

Faculty-student conflict has become more extreme, or seems to be so. But if we go back to the middle ages, we realize that at least our students rarely throw stones in class as they did in medieval times. But, as recent articles in the Chronicle of Higher Education reflect, the classroom conflict is become more severe. In fact, we are working on a new Jossey-Bass New Directions in Teaching and Learning which will address the issues of incivility in higher education, and I will be dealing with the issues of classroom conflict. Sam Keltner also addresses these issues in Mending the Cracks.

All of us here are concerned with the unionized setting of higher education. Joel Douglas addressed that in the book when he talked about the romanticized vision of the academy - the one that people wish existed but really never did. That vision has been replaced by an industrial prototype of labor relations, and conflict has been the result. He suggests ways to work more effectively within that system.

There is much, much more in the book, information about which you will find in your handouts. But what I have give you is a peek into the book, I hope whetting your appetite and giving you some insight into the paradigm shifts that we, in writing Mending the Cracks, are calling for in the academy.

Conflict in the academy is a sign of growth. It indicates, we hope, that the institutions are moving from status quo and often stagnation to a new era of effectiveness and of interdependence.

We're not there yet—as all of us in this room know. We have "miles to go before we sleep" to quote Robert Frost, and miles to go before this cartoon is no longer achingly true. *

> * (The cartoon shows a large table with people all around, and the caption says, "Let the secretary record the vote as 19 'Ayes' and one 'Not at this college during my lifetime...".)

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VIII. ANNUAL LEGAL UPDATE

A. **Emerging Labor Issues**

B. **Campus Bargaining and the Law:**
The AAUP's Perspective

C. **Affirmative Action:**
Piscataway Township Board of Education vs
Sharon Taxman

ANNUAL LEGAL UPDATE

A. EMERGING LEGAL ISSUES

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The emerging issues in labor and employment law in a unionized workplace have significance for the higher education workplace. Many interesting issues have emerged during this past year. One of the most controversial issues in the unionized workplace has been the issue of contracting outside of the workplace for services formerly performed by employees. One of the cases focused on in this summary is the Illinois Supreme Court's decision in the City of Belvidere v. ISLRB, where the court dealt with the issues of a city contracting with a private company to perform paramedic services, and whether this was a mandatory subject of collective bargaining.

In holding that it was not a mandatory subject of bargaining, the Court relied on its 1992 decision in Central city v. Illinois Educ. Labor Relations Bd., where the Illinois Supreme Court articulated the relevant test to determine whether or not an issue of a reduction in force was a mandatory subject of bargaining in the public school setting. The application of the Central City rationale to this recent outsourcing case may have an impact on public sector bargaining in general and implicates Higher Education as well.

Similarly, the issue of adjunct professors, teaching assistants and other "part-time" faculty members as appropriate bargaining unit members continues to be a hotly debated topic. :Recently, a "footnote" in the *Chronicle of Higher Education* discussed a new video available entitled "Degrees of Shame" which compares the plight of adjunct faculty members seeking recognition under the NLRA to that of migrant farm workers. Additionally a letter to the *Chronicle* Editor took issue with an article regarding the recent Yale University teaching assistant "grade strike." The letter decried the decision as indicative of the "hollowness of the conservative dismissal of worker's complaints." The ALJ in the Yale decision determined that this "strike" was not protected activity under the National Labor Relations Act.

Additionally, this summary includes significant FMLA and ADA decision in the unionized setting. While not within the educational workplace, these rulings clearly apply to any unionized workplace. Further, this summary will also focus on issues arising in the evolving areas of recognition petitions and the appropriateness of bargaining units in Higher Education.

Two other Illinois cases dealt with the issue of "part-time" status of faculty under the Illinois Education Labor Relations Act. In Community College Dist. No. 509 v. IELRB, the First District Court of Appeals affirmed the IERLB's decision that the part-time and full-time faculty had a sufficient community of interest to be represented within the same bargaining unit. But in William Rainey Harper Community. College 512 v. Harper College Adjunct Faculty Ass'n, IEA/NEA, the Fourth District Court of Appeals held that part-time faculty members were "short term" employees as defined under the IELRA, and were therefore not covered under the Act. While these decisions are not as recent as others in this summary, and each state's definition of "employee" will vary based upon the statute, the bargaining units and employer still struggle with the application of these decisions.

While this summary of cases is not designed to be comprehensive, it is intended to highlight those cases which may play a pivotal role in the development of issues affecting collective bargaining in higher education. Where appropriate, certain determinative facts of the cases have been included.

LABOR ISSUES

OUT-SOURCING

City of Belvidere v. ISLRB, 1998 Ill. LEXIS 342 (Feb. 20, 1998)

In a recent decision by Justice Bilandic, the Illinois Supreme Court reviewed the issue what types of out-sourcing decisions were to be considered mandatory subjects of collective bargaining. Although not an educational case, this decision may have an impact on subcontracting cases in the state, and other jurisdictions may follow the rationale both in the public and educational contexts.

In analyzing the case, the Illinois Supreme Court was required to determine whether or not the decision to contract out paramedic services to a private company constituted a mandatory subject of collective bargaining. The Court analyzed the mandatory subject of bargaining issue following its decision in Central City Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 149 Ill. 2d 496, 174 Ill. Dec. 808, 599 N.E. 2d 892 (1992).

The first prong of the Central City test involves a determination of whether the matter is one of wages, hours and terms and conditions of employment. If the answer to this question is no, then the inquiry ends and the employer is under no duty to bargain. If the answer is yes, then the second prong of the test must be reached. The second prong considers whether the matter, in addition to affecting wages, hours and terms and conditions of employment, is also one of inherent managerial authority. If the answer to this question is no, the analysis ends and the matter is considered a mandatory subject of bargaining. If, however, the answer to the second inquiry is yes, then the reviewing court proceeds to the third and final prong of the test. The third prong weighs the benefits that bargaining will have on the decision-making process against the burdens that bargaining imposes on the employer's authority.

The Court felt that this test, although initially developed in the education context, was applicable to public sector labor relations as well.

The Court then applied the NLRB's Westinghouse decision, 160 NLRB 1574 (1965), which held that an employer's unilateral subcontracting decision is a mandatory subject of bargaining when the subcontracting (1) involved a departure from previously established operating practices, (2) effected a change in the condition of employment, or (3) resulted in a significant impairment of job tenure, employment security or reasonably anticipated work opportunities for those in the bargaining unit. The Court determined that the firefighters employed by the city of Belvidere provided only basic and intermediate life support services, and that the city had "established an operating practice" where the firefighters and more qualified private paramedics worked side-by-side.

Therefore, the Court held, "the city did not depart from this practice in "quality and kind" as advocated by the Board, when the city formally contracted with the private service. Nor did the private contract result in the elimination of firefighter position, or in a reduction in wages for the city's firefighters. Finally, because of the "qualitative differences" in the level of skill between the city's firefighters and the private paramedics, providing paramedic services "did not represent a reasonably anticipated work opportunity fairly claimable by the City's firefighters. The Court held that because of this analysis, the first prong of the Central City test had not been met, and that the city's decision to contract paramedic services with a private company was not a mandatory subject of bargaining pursuant to Section 7 of the NLRA The Court affirmed the decision of the Court of Appeals.

FACTS: The city of Belvidere had been providing basic paramedic support to its citizens since 1974. Although by 1990 the city employed six firefighters who were qualified to provide intermediate paramedic support, the city was required to contract out services for the highest level of paramedic support. The two parties negotiated over the issue during the 1990 contract talks, but were unable to reach an agreement. The proposed, improved paramedic program was not implemented.

In response to perceived declining service, the city developed an ad hoc committee to recommend how to upgrade its services to its citizens. The committee recommended that proposals be solicited from private ambulance companies as well as from the union. During subsequent contract talks in 1992, the city and Union were again unable to reach an agreement about providing EMS services.

The city again solicited bids in 1993, and informed the union of the solicitation. The Union took the position that the City's letter was a proposal to modify the collective bargaining agreement between the Union and the city. The Union was informed that the city did not intend to reopen negotiations, and the Union requested that the city formally request to contract out paramedic services. The city refused, claiming it had no duty to bargain over the issue. Subsequently, the city contracted with a private ambulance service, granting it priority for EMS calls. The city's paramedics were called as backup to the private company.

An unfair labor practice charge was filed, and the ALJ determined this decision was a matter of "inherent managerial authority." The Illinois State Labor Board reversed the decision of the ALJ, and their decision was subsequently reversed by the Appellate Court.

FAMILY/MEDICAL LEAVE ACT

Diaz v. Fort Wayne Foundry, 131 F.3d 711 (7th Cir. 1997)

Judge Easterbrook addresses the issue of how a company must apply its collective bargaining agreement when facing an issue of the Family Medical Leave Act. The court stated that a "statute such as the FMLA . . . creates substantive rights" for the employees. However, "federal labor law requires employers to adhere to collective bargaining agreements: nothing in the FMLA entitled employees to variance from neutral rules about ways and means of giving notice."

FACTS: The employee, Diaz, was off on a FMLA leave for bronchitis, and was due to return to work on April 30, 1995. Diaz did not return to work as scheduled, but called his employer, to let them know that he was receiving medical treatment in Mexico, and that additional medical information would be delivered to the employer shortly. This information arrived at the employer's office on May 5, indicating that Diaz was being treated for lower gastrointestinal problems including a hiatal hernia and a duodenal peptic ulcer. Diaz's Mexican physician indicated that he would require an additional one and one-half months of rest.

The employer was not satisfied by this information, and to resolve the conflict between Diaz's two physician reports "invoked its option under 29 U.S.C. § 2613 to require a second opinion." The employer mailed a certified letter to Diaz's home, and received notification of return receipt, signed "Alfredo D." Diaz, however, never arrived for his medical evaluation, and never asked for a different or more convenient appointment. The employer exercised its second opinion option under the FMLA, and notified Diaz in the acceptable manner under the company's collective bargaining agreement With the Union. Diaz did not contract the Human Resources department directly, as he was required to do under the employer's work rules. Diaz was justly terminated on June 15.

AMERICANS WITH DISABILITIES ACT

Kralik v. Durbin, 130 F.3d 76 (3rd Cir. 1997)

Judge Greenburg of the Third circuit Court of Appeals reviewed whether an employer must provide reasonable accommodation under the ADA to an employee that would also require the employer to violate its established collective bargaining agreement. Agreeing with the Fifth and Seventh circuits, the court concluded that a "reasonable accommodation" which would require the employer to violate the collective bargaining agreement is not reasonable, and that the collective bargaining agreement prevails.

FACTS: Plaintiff, a Pennsylvania toll booth operator, requested a "reasonable accommodation" from her employer, which would allow her not to be part of the "forced overtime assignment" required under the collective bargaining agreement. Plaintiff suffered from a non-work related back injury and claimed it prohibited her from working more than an eight-hour shift. The Toll Commission's overtime policy assigned overtime when additional people were needed to fill a shift. If no senior employees agreed to work overtime, junior employees were required to work the overtime to keep the tollbooth open. Allowing the plaintiff's accommodation would force the Commission to violate the agreement.

Hendricks-Robinson v. Excel Corp., 972 F. Supp. 464 (C.D. Ill. 1997)

Class action brought by employees of a meat processing plant in central Illinois, argued that the Company's medical layoff policy, in conjunction with the Employer's worker's compensation program, violated the ADA. The District Court, Judge Mills, determined that the company was not required to make "light duty" positions permanent assignments as a reasonable accommodation under the ADA. Nor was the "physical fitness" requirement contained in the collective bargaining agreement's job description a violation of ADA. This case is currently on Appeal to the Seventh circuit; oral arguments were heard on April 3, 1998.

FACTS: In an effort to reduce employee injuries, the company began an intensive ergonomic review of all production positions. The employer changed its policy and no longer assigned "permanently restricted" employees to light duty positions. The new policy reserved light duty jobs for those employees with temporary restrictions.

Those injured employees would work light duty until they were able to return to their former positions. Employees with permanent medical restrictions were evaluated to determine if the employee could perform the physical requirements of the job which they held prior to receiving any medical restrictions or if they could perform the essential functions of any other vacant production position in the plant. If they could not, the employer placed these permanently restricted employees on medical layoff.

During this medical leave, employees could bid on open position within the organization. If that employee was the most senior and capable of performing the essential functions of that job, the employee was awarded that position. Employees on medical layoff for more that 12 months were terminated from their employment with the company, per the collective bargaining agreement.

EDUCATION CASES

"CONSIDERED SUSPENSION" UNDER STATE LABOR LEGISLATION

Corbett, et. all v. Scranton School District, 1997 Pa. Commw. LEXIS 870, (Nov. 26, 1997)

The Pennsylvania Commonwealth determined that the "Transfer of Entities" Act applied to existing Collective Bargaining Agreements, as it was enacted to protect unit teachers at a time when it was anticipated that many would be suspended. The language of the Transfer of entities Act was designed to modify "provisions of the Collective Bargaining Agreement," and at the time the statute was enacted there had never been a labor agreement in effect between the teacher organizations and school districts or other public school entities for a term greater than six years. However, the CBA language at issue in this case was taken to supersede the language of the "Transfer of Entities" Act, because the provision at issue was a part of the CBA between the parties in effect on Feb. 3, 1982 [enactment of the Transfer of Entities Act] and continued to be included in successive CBA's up to and including the current CBA.

FACTS: Special education teachers, as employees of a bargaining unit, had previously provided visual and hearing impaired services to students of the District. The teachers all had more than seven years of teaching experience. The District announced that it would begin to provide these services directly, and the plaintiff teachers asked their bargaining unit to "voluntarily suspend" them, so that they would be eligible for hire by the District. The District, upon hiring the teachers only credited them with seven years of experience for salary step purposes in compliance with another provision of the Collective Bargaining Agreement which stated, "newly appointed teachers shall receive year for year credit on the salary schedule for no more than seven years of prior teaching experience." This provision of the CBA had been in effect and in each CBA since 1982.

RECOGNITION

University of Alaska v. United Academic Adjuncts, Case No: 3AN-97-03432 CI. (Unpublished Decision, January 6, 1998)

The Superior Court of Anchorage affirmed the decision of the Alaska Labor Relations Agency that there was sufficient showing of support for University of Alaska's part-time faculty members to collectively bargain with the University. The University objected claiming that the faculty members were not "public employees" as defined by the Alaska Public Employment Relations Act because the faculty were not employed full-time or on an on-going basis.

The Judge disagreed and stated "[i]f an employer was privileged to defeat a representation petition based upon the transient nature of its employee population, then every employer would use this process to frustrate the collective bargaining rights." The Court "affirmed the Agency's interpretation of its own regulation as reasonable, as well as the agency finding that adjunct faculty are "public employees" under the PERA.

Yale Univ. and Graduate Employees and Student Org., 1997 NLRB LEXIS 619 (Aug. 1997)

The ALJ hearing this case determined that Teaching Assistants are not automatically recognized as employees under the NLRA, and if their organizing activities disrupt the regular operations of the University's business, the university may not be required to recognize the bargaining unit. The ALJ held that by staging a "grade strike" and withholding grades, the TA's had withheld University property, and that the University was "entitle to assert its private property rights and demand its premises back. By allowing such a strike, the Board "would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine the conditions of employment."

FACTS: The Teaching Assistants at Yale University engaged in a grade strike in an attempt to have the university recognize them in a bargaining unit. The TA's refused to turn in final grades at the end of the semester in an effort to pressure the administration into recognition and bargaining. The TA's, however, did offer to provide letters of recommendation or explanation to those students who were relying upon those grades for admission to another university. The University contended that the TA's were not employees under the NLRA and that their actions and refusal to turn in grades was a "partial strike" unprotected by the NLRA. The TA's alleged a violation of Section 8(a)(1) and (3) arguing that the University had threatened reprisals against them, and had discriminatorily denied them future teaching assignments. The ALJ confirmed that partial strikes or work slowdowns are not protected "when it is unlawful, violent, in breach of contract or otherwise indefensible."

SUCCESSORSHIP

Metropolitan Comm. Col. Dist. #541, 13 PERI (LRP) 1-1047 (March 11, 1997)

An Illinois Education Labor Relations Board ALJ reviewed the obligations of a successor community college to recognize and negotiate with the predecessor's existing unions. The ALJ stated that "nothing in the provisions of the Illinois Public Community College Act, which governed the replacement of the experimental State Community College district (SCC) with the permanent Metropolitan Community College district (MCC), removed either SCC or MCC - from the Act's coverage. The Successor College had no more right to ignore their obligation, imposed under the Act, that they had to ignore any other Illinois statute.

The ALJ also addressed the extent of those obligations. The ALJ determined that since the experimental college ceased to exist as an entity the SCC was required to bargain over the effects of that closing. By refusing to bargain the effects with the Unions, SCC violated the requisite provisions of the IELRA. However, because SCC has ceased to exist, the ALJ looked to successor relationship cases decided by the NLRB to determine the proper remedy. "In the private sector one who acquires and operates a business of an employer found guilty of unfair labor practices, in basically unchanged form, and in circumstances which provide him with notice of the charges against his predecessor, [the successor] is held responsible for remedying his predecessor's unlawful conduct.

The ALJ analogized Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), and determined that MCC had notice of the unfair labor practice when it assumed control of the predecessor entity. Here, "the educational employer is itself a governmental entity, subject to whatever duties the legislature may choose to impose . . . and therefore cannot escape the obligation to remedy its predecessor's unfair labor practices."

MCC was obligated to bargain with the Complainants if a majority of its employees in the appropriate unit had been employed by its predecessors. MCC was not, however, bound by the "substantive provisions of the predecessor's collective bargaining agreements." MCC did hire a majority of the faculty employees from the predecessor SCC, but not a majority of the employees represented by the second union. MCC, therefore, had an obligation to recognize Local 3912 as the exclusive representative of those academic employees.

APPROPRIATE UNIT

University Professionals of Illinois v. Edgar, 1996 U.S. Dist. LEXIS 14351; 153 LRI-M 2449 (September27, 1996)

An Illinois Statute requiring University Professionals to be part of the same bargaining unit took precedent over the fact that the Professionals at the University of Illinois-Springfield had been covered by a different bargaining unit. In reviewing the claim of unconstitutionality, the District Court held that the statute met rational basis scrutiny. While the "relationship between higher quality education and a single bargaining unit encompassing faculty at all three campuses is not obvious . . . it is [also] not obvious that there is no relationship between them. Therefore, "the call belongs to the body enacting the statute." The legislature expressed an intent to have all of the University of Illinois' faculty to be part of one system, "to ensure uniformity with respect to academic faculty matters, and the operation of 'one system' with respect to academic faculty." The court concluded that a single bargaining unit for academic faculty at the University of Illinois is appropriate.

FACTS: Plaintiffs, members of the Union representing University Professionals at the three campuses of the University of Illinois, challenged the constitutionality of Section 50-243 of the Illinois Educational Labor Relations Act under provisions of both the United States and the Illinois Constitutions. Section 50-243 provides that all University Professionals employed by the University of Illinois must be represented by the same bargaining unit. Members of the University's Springfield unit objected to this because prior to their incorporation into the University, the Springfield campus had been known as Sangamon State University, and its faculty was represented by a different bargaining unit. Plaintiffs argue that requiring them to be subsumed into the existing University of Illinois unit was a violation of the Equal Protection Clause and the First Amendment, and that enforcing the statute denies the academic faculty at all campuses of the University of Illinois the right to Board determination of their appropriate bargaining units.

SHORT TERM FACULTY

William Rainey Harper Community College 512 v. Harper College Adjunct Faculty Ass'n, IEA/NEA, 273 Ill. App. 3d 648 (4th Dist.), cert. denied, 163 Ill. 2d 591 (1995).

The Fourth District Illinois Appellate Court held that "part-time" adjunct faculty members were not covered employees under the IELRA, which excludes faculty members providing less than six credit hours of instruction each semester. In reversing the IELRB, the Court stated that allowing an adjunct faculty member to teach only six hours in one semester of each of three consecutive years and to become an "educational employee" enjoying the protection of the Act, would ignore the plain language of Section 2(b) [of the IELRA], and lead to "uncertainty and confusion with employees routinely entering and leaving the bargaining unit." Community College Dist. No. 509 v. IELRB, 277 Ill. App. 3d 114 (1st Dist. 1996)

The First District Illinois Appellate Court district upheld that IELRB's determination that part-time faculty members and full-time faculty shared a sufficient community of interest to be represented by the same bargaining unit. The IELRB weighed the statutory requirements under Section 7(a) of the IELRA, and placed greater weight on the functional equivalence of the "regular" part-time faculty to the full-time faculty and a lesser weight on the differences between the two groups. Because the language of Section 7(a) requires that specific determinations be made in each case, the determination of bargaining units will turn largely on questions of fact. Therefore, the court determined that the IELRB had appropriately reviewed the facts in this case, and that its determination was justified.

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ANNUAL LEGAL UPDATE

B. CAMPUS BARGAINING AND THE LAW: THE AAUP'S PERSPECTIVE

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INTRODUCTION

This presentation will address major developments over the past year in several issues in higher education law of special interest to faculty members and their unions: (1) eligibility for collective bargaining; (2) sexual harassment; (3) academic freedom; and (4) affirmative action. The American Association of University Professors (AAUP) has been following these developments closely as the roles and responsibilities of faculty members continue to change in conjunction with changes in the academy as a whole.

ELIGIBILITY FOR COLLECTIVE BARGAINING

Changes in the nature and degree of faculty responsibilities in higher education with regard to teaching, research, management, and administration have raised significant legal issues as to eligibility for collective bargaining. This section will highlight a recent victory for faculty members seeking to engage in collective bargaining in the private sector, which has been largely circumscribed since the Supreme Court's 1980 Yeshiva decision. The right of faculty members in the public sector to engage in collective bargaining is mostly a matter of state law and practice, and varies from state to state. The ability of adjuncts, teaching assistants, and other part-time faculty to engage in bargaining is covered separately in the outline prepared by fellow presenter Vickie Gillio.

PRIVATE SECTOR FACULTY

In a rare victory for faculty collective bargaining in the private sector, the right of professors at a small private institution to be represented by a union was upheld by the National Labor Relations Board (NLRB) at the University of Great Falls in Montana.[1] Professors at this Roman Catholic institution voted for a union by a narrow 20-19 margin after the NLRB affirmed their right to do so in

December 1997 despite objections from the administration based on the Supreme Court's Yeshiva decision.[2] The Court ruled 5-4 that professors at Yeshiva University had enough influence over university governance to be considered "managerial" employees, and therefore were not eligible to bargain collectively under the National Labor Relations Act. The Court defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."[3]

The Board found that faculty members at Great Falls were not managerial employees after noting among other things that (1) faculty members constituted a majority only on university committees that were solely advisory in nature; (2) the university administration had unilaterally established academic rules without faculty input; and (3) deans rather than non-dean faculty determined course schedules, approved students for graduation, and made other decisions relating to students' academic progress.

The specific limitations placed on the decision-making authority of non-dean faculty members at Great Falls, in areas in which faculty members generally exercise considerable discretion, make it difficult to read too much into the NLRB's decision to allow collective bargaining in this private sector context. On the one hand, Great Falls cannot and should not be held up as a model of shared governance in higher education. On the other hand, to the extent that private colleges and universities succumb to increasing pressures from some quarters to adopt so-called "corporate models" of governance in which faculty members have a limited voice in academic decisions, they may increase the likelihood that the NLRB would find that their faculty are not managerial employees and therefore eligible to belong to unions. Furthermore, given the economic pressures on faculty members resulting from the tight job market and increasing use of part-time and adjunct professors, among other factors, private sector faculty may become more willing to consider collective bargaining and hence more willing to test the Yeshiva standard.

One possible test case may arise at Manhattan College in New York, another Roman Catholic institution, where a hearing on an election petition covering approximately 160 full-time faculty is nearing a conclusion. The administration in that case has raised objections based on the institution's religious affiliation[4] as well as on Yeshiva. The petition was filed in 1996.

SEXUAL HARASSMENT

Sexual harassment in the workplace has been one of the most widely discussed and controversial legal topics this past year, largely as the result of the case brought against President Clinton by Paula Jones. After years of conflicting and confusing district and circuit court opinions and only two Supreme Court decisions on the subject, the Supreme Court this term decided to review four cases relating to various aspects of the law on sexual harassment. Given the changing dynamics of gender roles and power relationships in the academy, these issues continue to be important in higher education. Just last year, the U.S. Department of Education's Office for Civil Rights issued long-awaited policy guidance on sexual harassment of students by faculty members and other employees under Title IX of the Education Amendments.[5] The two basic types of sexual harassment, *quid pro quo* and hostile environment, are covered in the guidance. The guidance also recognizes the importance of academic freedom and free speech rights in the education context, as well as the need for due process for those accused of harassment.

Depending on the nature and breadth of the decisions issued by the Supreme Court this year, colleges and universities may need to reexamine their sexual harassment policies, particularly with regard to their definitions of harassment and the nature and degree of harm that must be demonstrated. To protect themselves to the extent possible from liability for harassment committed by their own employees, institutions will need to be sure that these policies are clearly articulated, published in writing, and widely disseminated. In addition, institutions will want to review their sexual harassment complaint procedures to ensure that official channels exist and are made available through which the institution can receive actual notice of allegations of harassment from employees or students, and then investigate as necessary. These policies and procedures are frequently incorporated into collective bargaining agreements and faculty handbooks, so faculty members need to be aware of the applicable legal standards when reviewing and negotiating these policies and procedures.

EMPLOYER LIABILITY FOR HARASSMENT BY EMPLOYEES

Three pending Supreme Court cases address the circumstances in which an employer is liable for a supervisor's actions. Faragher involves liability for the creation of a hostile environment, Gebser addresses liability of a school district for a teacher's relationship with a student, and Ellerth deals with employer liability for *quid pro quo* harassment in the absence of tangible adverse job consequences when an employee resists a supervisor's threats. The Supreme Court has stated previously that courts should "look to agency principles for guidance" in determining employer liability for sexual harassment,[6] but lower courts have been inconsistent in their application of these principles in *quid pro quo* and hostile environment cases.

Faragher v. City of Boca Raton[7]: This case addresses the circumstances in which an employer is liable for a supervisor's actions in creating a sexually hostile environment under Title VII of the Civil Rights Act of 1964. In this case, a lifeguard claimed that she was harassed by her supervisors, but she did not complain about their misconduct to recreation department officials. The Eleventh circuit held that a supervisor's harassing conduct is typically outside the scope of his or her employment, and that absent proof of actual or constructive knowledge of the harassment, the employer is not vicariously liable for a supervisor's actions.

Gebser v. Lago vista Independent School District[8]: This case, filed under Title IX of the Education Amendments, involves the liability of a school district for sexual harassment of a student by a teacher. The case involves allegations of sexual harassment by a teacher who had a relationship with a fifteen-year-old student. The student did not report the alleged harassment to any high-level school officials. The Fifth circuit held that the school district could not be liable unless it actually knew of the abuse as it was going on and failed to do anything about it. The justices' questions during the Supreme Court oral argument seemed to suggest that the Court is unlikely to rule that a school district is liable under Title IX for sexual harassment by a teacher unless it had knowledge of the harassment and failed to act to end it.

Burlington Industries, Inc. v. Ellerth[9]: The question in this case is whether an employer is strictly liable for a supervisor's *quid pro quo* sexual harassment under Title VII, even if the supervisor's threat does not result in tangible adverse action by the employer. The employee alleges that she endured a barrage of sexual comments, innuendo and occasionally more from a company vice president. She rejected the vice president's advances and was promoted anyway. The nature of the harm that must be demonstrated to establish a harassment claim under the discrimination laws has long been one of the most vexing legal issues for federal courts, and served as a focal point in the decision in the Paula Jones case.

SAME-SEX HARASSMENT

Oncale v. Sundowner Offshore Services Inc.[10]: The Supreme Court issued a unanimous opinion in this case, holding that same-sex harassment can constitute a cause of action under Title VII. The decision also reinforced the principle that both men and women are protected from sex discrimination under Title VII. In so ruling, the Court allowed the plaintiff to pursue his case at the trial court level. In order to constitute discrimination, however, the plaintiff in such a case must still demonstrate that the harassment is based on sex—i.e., general workplace harassment does not state a cause of action under Title VII. It may be difficult to demonstrate such discrimination in a case such as this one, involving harassment of a male employee on an oilrig by other men in an all-male workplace. Moreover, harassment based on sexual orientation is not covered under Title VII, although it is now covered in many state, local, and college and university discrimination policies. The case has sparked interest among some legal analysts in more general laws that would prohibit all such "harassment" in the workplace, regardless of the basis for the harassment. Such laws could have a potential chilling effect on free expression, however, and would therefore raise serious concerns with vagueness under the First Amendment.

ACADEMIC FREEDOM

Academic freedom of faculty members has been challenged in a variety of contexts in recent cases. Some of the most significant recent cases are described below.

RESEARCH

Beverly Enterprises. Inc. v. Bronfenbrenner[11]: A serious challenge to academic freedom in faculty speech and research has been raised by the case of a member of Cornell's academic staff sued for defamation for testimony she gave before members of Congress. Dr. Kate Bronfenbrenner, director of labor education research at Cornell University's School of Industrial and Labor Relations, has been sued in federal district court in Pennsylvania by Beverly Enterprises, Inc.-one of the largest nursing home chains in the United States-based on statements she made during a congressionally sponsored "town hall meeting" about her research relating to violations of the National Labor Relations Act. Congress was considering legislation prohibiting the awarding of federal contracts to companies that violate federal labor laws, and Bronfenbrenner criticized Beverly's record, among many other employers, based on her research that argues for a reform of the labor law. The suit demands not only at least $225,000 in damages, but also, as part of the pretrial discovery process, that Bronfenbrenner turn over details on years of her research about labor organizing.

Concerned with this threat to scholarly research, MUP has moved quickly to file a friend-of the-court brief in support of Cornell University's motion, on behalf of Bronfenbrenner, seeking immediate dismissal of the suit. Hundreds of academics from around the world, including two former U.S. Secretaries of Labor, have signed a petition protesting the defamation suit as an attack on academic freedom. A similar suit against an official from the Service Employees International Union (SEIU), who had provided similar testimony at the same town hall meeting, has already been dismissed in the Pennsylvania federal district court on the basis of "legislative immunity" under Pennsylvania law,[12] but Beverly Enterprises is expected to appeal that ruling. The case raises the specter of defamation suits aimed at faculty members for statements based on their scholarly research that might be made in all sorts of contexts (e.g., at conferences, hearings, or even in class discussions), when those statements relate to powerful corporate or economic interests.

FACULTY SPEECH

Gee v. Humphries, et al. (Florida A & M University[13]: Without a written opinion, the Eleventh circuit recently affirmed a district court decision upholding the discipline of a professor who was suspended, denied tenure and ultimately terminated after using a racially charged term in remarks to students before the start of a public relations class about the university's career development opportunities in that field. Although Professor Gee indicated that the racial term was not directed at any particular individuals and noted that other faculty members at the institution used it in speaking to students, the comment offended several black students at the historically black institution, and the university found that the comment constituted racial harassment. The federal district court judge granted summary judgment to the university, concluding that Professor Gee's remark did not address a matter of "public concern" meriting First Amendment protection.

and that the university president's own interest in "academic freedom" permitted him to discipline the professor even without a specific written rule prohibiting the conduct at issue. AAUP filed an *amicus* brief in the Eleventh circuit, arguing that a faculty member's educational responsibilities extend to interactions with students beyond mere class time, that their speech on a university's career development opportunities relates to a matter of public concern, and that discussion of a controversial word choice reflects and reinforces (rather than undermines) a well-functioning educational process.

Hall v. Kutztown University[14]: A federal district court judge ruled that Kutztown University of Pennsylvania violated a philosophy professor's right to free speech when it denied him a tenure-track position after he spoke out against multicultural education and said he "abhorred" the "barbaric" practices of certain cultures. In response to a question from the dean of liberal arts and sciences at a faculty meeting, Professor Hall stated that he opposed multicultural education. He went on to criticize a variety of practices from other cultures, and said that his comments reflected his belief in moral absolutism over moral relativism. He was subsequently rejected for two tenure-track positions, even though a departmental search committee had recommended that he be hired for the first one. The court found that Hall's comments constituted a matter of public concern, and that they did not disrupt university operations. The judge has yet to rule on Professor Hall's request for damages. The university has indicated that it may appeal the decision.

UNIVERSITY PUBLICATIONS

Kincaid v. Gibson[15]: A federal district court judge in Kentucky recently ruled that university publications may be subject to the same potential content-based restrictions permitted by the Supreme Court with regard to high school publications per its decision in Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Several current and former Kentucky state University (KSU) students filed suit, alleging violation of their First Amendment rights of speech and association, after KSU officials declined to distribute a student-produced yearbook because it allegedly covered current events instead of focusing on university activities, failed to display the university's colors, and failed to identify students in photograph captions.

The district court held that the university could maintain editorial control over the content of the students' yearbook because this university-sponsored publication was "state property" that the university had not intended to create as a public or limited public forum. The court found no specific evidence that the yearbook was "intended to reach or communicate with anybody but KSU students." Moreover, the yearbook and student newspaper faculty adviser, who objected to the confiscation of the yearbook, was removed from her responsibilities. The case is now on appeal to the Sixth circuit, and the Student Press Law Center is coordinating *amicus* brief activity on behalf of the students. MUP is planning to file an *amicus* brief in this case because the district court decision largely ignores the difference between the contexts of K-12 and higher education, thus setting a potentially dangerous precedent for the censorship of university—sponsored publications.

ARTISTIC FREEDOM

National Endowment for the Arts v. Finley[16]: The Supreme Court heard oral arguments on March 31, 1998 in a case challenging the constitutionality of a requirement that "general standards of decency" be taken into account by the National Endowment for the Arts (NEA) in making grants to artists. The government appealed a decision of the Ninth circuit holding that the decency standard was unconstitutionally vague.[17] In the oral argument, the Supreme Court justices asked a number of questions relating to whether the "decency" standard in practice could or would be used to discriminate against artists with particular points of view. The justice also questioned whether a government agency could attach such conditions when providing public funding for private artists who do not purport to speak for the government.

AAUP filed an *amicus* brief with several other organizations concerned with academic and artistic freedom, arguing that the decency requirement undercuts artistic expression protected by the First Amendment, and that the vagueness of the language creates a chilling effect on artistic creativity. The brief highlights the close and vital links between the values that underlie artistic and academic freedom, noting that many creative and performing artists are members of the academic community and that academic institutions have over the years sheltered and nurtured novel and imaginative art of all kinds. The case could have important implications for the types of restrictions that the government might place on public funds for all sorts of research and activities. A decision is expected early this summer.

AFFIRMATIVE ACTION AND "REVERSE DISCRIMINATION" IN FACULTY EMPLOYMENT

Recent attacks on affirmative action in higher education are not limited to student admissions and financial aid. Challenges have also been lodged against affirmative action practices in the employment context, specifically with regard to programs designed to foster racial and ethnic diversity among faculty. Additionally, legislation or referenda at the state level similar to California's Proposition 209 continue to be discussed in a number of states (e.g., Washington), and most of these efforts include prohibitions on affirmative action in public sector employment. As institutions face pressures from accrediting bodies and others to diversify their faculties, in today's legal climate they must be prepared to defend themselves against "reverse discrimination" complaints from white academics who lose out to minority candidates in the hiring or promotion process.

The Supreme Court has still not addressed the issue of whether racial diversity among faculty may constitute a compelling interest sufficient to justify the consideration of race in faculty employment decisions. The Court had been set to review Taxman v. Board of Education of Piscataway[18] this term, but a coalition of civil rights organizations engineered an eleventh hour settlement to get the case out of the Supreme Court. The facts of Piscataway presented a difficult case: a school district used race as the decisive factor in a teacher layoff decision based on a diversity-based affirmative action plan that had not been updated in years. AAUP joined other higher education organizations in an amic21s brief before the Supreme Court arguing that racial diversity among faculty and students in higher education can constitute a compelling interest.

Not long after the Piscataway settlement, the Court turned down an opportunity to review a case presenting similar issues in higher education. In University and Community College System of Nevada v. Farmer,[19] the highest state court in Nevada upheld a university's diversity-based affirmative action plan for faculty hiring. In Farmer, a white female professor claimed that the University of Nevada-Reno discriminated against her when it hired a black male from Uganda to fill a vacancy in its sociology department, and again when it hired her a year later at a lower starting salary in the same department. The University's affirmative action program included a "minority bonus policy" under which a department was allowed to hire an additional faculty member if it first hired a minority candidate.

The Nevada Supreme Court held that the University demonstrated a compelling interest in fostering a culturally and ethnically diverse faculty, and that the goal of a racially diverse faculty was analogous to the goal of a diverse student body countenanced by the Supreme Court in the 1978 Bakke decision.[1] The court also upheld the higher salary awarded to the black professor on the basis of market forces, recognizing that the University had offered him a slightly higher salary than originally advertised to preempt other interested institutions from hiring him. Although the decision has binding precedential value in Nevada only, affirmative action proponents will undoubtedly cite Farmer as support for their cause in other jurisdictions -- just as the opponents of affirmative action nationwide have seized upon the Hopwood[21] decision out of Texas (striking down a university's race-conscious affirmative action admissions program) in spite of the Supreme Court's refusal to review that decision. For now, however, the Bakke decision remains the Supreme Court's single statement on affirmative action in higher education, and will continue to serve as the touchstone for legal analysis of these issues at the national level.

The affirmative action programs in place at most universities today are premised on diversity rather than remedying discrimination, given that an individual institution cannot base its programs on the need to remedy societal discrimination. The U.S. Department of Education has continued to recognize diversity as a compelling interest in higher education,[22] and is providing technical assistance to institutions reviewing affirmative action programs in admissions and financial aid. Many of the same principles applicable to programs for students also apply to diversity-based programs for faculty recruitment and promotions. In today's legal and political climate, the bases for all such programs must be carefully articulated, reviewed, and updated regularly to reflect current circumstances. If and when a legal challenge is brought, a court will scrutinize it carefully for measurable, articulated evidence of the educational benefits of diversity, and for how those benefits are tied to the educational mission of the institution.

A consortium of higher education organizations and researchers are trying to meet this evidentiary challenge by coordinating efforts to study the educational impact of racial and ethnic diversity for students and faculty members. For example, AAUP's Committee L on the Historically Black Institutions and the status of Minorities in the Profession has been working with the American Council on Education to develop a faculty survey on the educational impact of diversity from the faculty perspective.

MORE CASES TO COME

Affirmative action in faculty employment decisions may have dodged a bullet in the Supreme Court in the settlement of the Piscataway case, but more such cases are on the horizon in the lower courts. For example, a journalism professor who claimed that Bowling Green University conducted a job search in a biased manner to satisfy an accreditor's demand that it hire more minority professors was awarded $122,000 in damages by a federal jury.[23] This white professor charged that the post had been financed by Bowling Green's Minority Enhancement Fund, which was set up to pay the salaries of minority professors, and that all 17 people deemed qualified for the job were minority candidates.

Elsewhere, the Second circuit recently reversed a lower court decision and ordered a jury trial to review charges that Columbia University discriminated against an instructor because he was not of Hispanic descent.[24] The plaintiff, who had taught Spanish and Portuguese at Columbia since 1978 and even served as interim director of the University's Spanish language program for two years, was allegedly not seriously considered for the permanent directorship because he is a white male of Eastern European descent. The University claimed that though the plaintiff was a finalist for the position, it chose another candidate based on qualifications, not bias. The person who was hired is described in court papers as an American of Hispanic descent. The plaintiff alleges that this individual had not yet earned his Ph.D. had less teaching experience and had written less extensively than the plaintiff, and was not proficient in Portuguese. The search committee at Columbia asked each of three finalists (including these two) to teach "tryout" classes, and found that the candidate they selected "mesmerized" the class while the plaintiffs teaching was weak.

Given the legal and political attacks on affirmative action in higher education and the tight job market for academics, colleges and universities should anticipate more such challenges from white faculty members when diversity is a basis for employment decisions, and should be prepared to articulate and defend the need for the criteria used in every decision.

ENDNOTES

University of Great Falls and Montana Federation of Teachers, AFT, AFL-CIO, Case No. 19RC-13 114 (Nov. 8, 1997).

NLRB v. Yeshiva University, 444 U.S. 672 (1980).

Id. at 682, quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974).

See NLRB v. Catholic Bishop of Chicago 440 U.S. 490 (1979) (limiting NLRB jurisdiction over church-operated schools).

62 Fed. Reg. 12034 (March 13, 1997).

Meritor Savings Bank, FSB v. Vinson, 447 U.S. 57 (1986).

No. 97-282 (1998). (Ruling below: 111 F.3d 1530 (11th Cir.))

No. 96-1866 (1998). (Ruling below: 106 F.3d 1223 (5th Cir.))

No. 97-569 (1998). (Ruling below: 123 F.3d 490 (7th Cir.))

76 F.E.P. Cases 221, U.S. Sup. Ct., No. 96-568 (March 4, 1998).

This case is pending in the Western District of Pennsylvania , as of April 3, 1998.

Beverly Enterprises, Inc. and Donald L. Dotson v. Rosemary Trump and The Service Employees Internat'l Union, Local 585, No. 97-1490 (March 5, 1998).

No. 97-2265 (11th Cir. Apr. 3, 1998).

No. 96-4516 (E.D. Pa. Jan. 12, 1998).

Kincaid v. Gibson, Civ. No. 95-98 (E.D. Ky. Nov. 14, 1997).

No. 97-37 1(1998).

Finley v. National Endowment for the Arts, 100 F.3d 671 (9th cir. 1996).

91 F.3d 1547 (3d. Cir. 1996), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997).

930 P.2d 730 (Nev. 1997), *cert. denied* (March 9, 1998).

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

In its guidance on race-targeted financial aid, the U. S. Department of Education's Office for Civil Rights provides more latitude for programs based on diversity, particularly with regard to the pipeline for future faculty.

> A college's academic freedom interest in the 'robust exchange of ideas' includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school. A university could contribute to this interest by enrolling graduate students who are committed to becoming professors and who will promote the overall diversity of scholars in their field of study, regardless of the diversity of the students who are admitted to the university's own graduate program.

59 *Fed. Reg.* 8756, 8761 n.8 (Feb. 23, 1994).

The Chronicle of Higher Education., Mar. 27, 1998, at A14.

Stern v. Trustees of Columbia Univ. in the city of New York, 1997 WL 763491 (2d Cir. Dec. 12, 1997).

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[1] Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

ANNUAL LEGAL UPDATE

C. AFFIRMATIVE ACTION

Piscataway Township Board of Education
vs. Sharon Taxman
Respondent's Perspective

(The Argument That *Would* Have Been Made to the United States Supreme Court)
[Editor's Note: The case was settled before the matter was heard by the court.]

Stephen E. Klausner, Esq.
Klausner & Hunter[1]

STATEMENT OF THE CASE

In May, 1989, facing the need to reduce its teaching staff by one, the Piscataway Township Board of Education ("Board") decided that—as between two tenured teachers of secretarial skills in the ten-person Business Education Department of Piscataway High School—it would retain Debra Williams, an African-American, and lay off Sharon Taxman, a Caucasian, because of the difference in their race. The Board claimed that it took this action in the interest of educational "diversity", because Williams and Taxman were deemed otherwise equal in seniority and teaching ability, and Ms. Williams was the only Black in that particular department.

At the time of the decision to lay off Taxman in 1989, Taxman and Williams each had nine years' experience in the "seniority categories" of Typewriting and Secretarial Studies. In other respects, however, their records differed. Taxman had nine years of experience in General Business and Bookkeeping & Accounting, whereas Williams had only four years and three months in those "seniority categories". (Seniority categories are determined pursuant to N.J.A.C. 6:3-5.1(b) and 6:3-5.1(1)(17).) Taxman had taught a broader range of courses, including advanced courses such as Computer Systems; Williams principally taught basic courses such as Typing and Secretarial Studies. Taxman had also performed extracurricular or co-curricular activities for many years, while Williams, during the relevant period, had not provided those services.

As the District Court noted, the Board stipulated that it had never engaged in racial discrimination and that the percentage of blacks and other minorities on its teaching staff and overall work force compared favorably with the minority composition of the available labor market. 832 F.Supp. at 83839. The Board's Affirmative Action Program was adopted in December, 1975 in response to a directive from the New Jersey State Board of Education requiring each school district "to develop a policy of equal education opportunity" and adopt two affirmative action plans, one pertaining to classroom practices and one to employment practices. N.J.A.C. 6:4-1.3(a)-(b). Petitioner's program contained the following "Statement of Purpose":

> The basic purpose of the program is to make a concentrated effort to attract women candidates for administrative and supervisory positions and minority personnel for all positions so that their qualifications can be evaluated along with other candidates. In all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the Affirmative Action Program will be recommended. J.A. 57a-58a (emphasis added).

As the District Court found, "the Board's purpose in adopting this language was to grant a preference in hiring to minority candidates, hence the directive that in cases in which two or more candidates are equally qualified, the minority candidate is to be selected." 832 F.Supp. at 838.

The Board's program was not adopted in response to prior discrimination or even statistical imbalance:

> No charges of race-based discrimination had been filed with any State or Federal agency against the Board or any of its employees prior to the adoption of the 1975 Affirmative Action Program. Indeed, there is not even a suggestion that the Board has ever intentionally discriminated against any employee or applicant for employment on the basis of race. Moreover, at the time the Affirmative Action Program was adopted, the statistical reports required by the New Jersey Department of Education showed no underrepresentation of black employees in the reporting categories required by the State. 832 F.Supp. at 838-39.

In 1976, the Board added an "Employment Practices Addendum" to the 1975 program, which contained an analysis of minority and female employment across various job categories in the Piscataway school system. In this document, the Board found that it was not underutilizing minorities in any job category. Specifically, "with reference to the job category of 'professionals', which includes teachers, the statistics listed in the document indicate that while minorities comprised 7.4% of the statewide pool of persons with the requisite skills for the professional positions, 10% of the Board's work force in this category were minorities." 832 F.Supp. at 839.

In April, 1983, the Board adopted a policy entitled "Affirmative Action—Employment Practices", which used essentially the same language as the 1975 program, including the directive that "when candidates appear to be of equal qualification, candidates meeting the criteria of the Affirmative Action Program will be recommended." Here, too, the Board was not acting in response to past wrongdoing or statistical imbalance:

> As was the case in 1975, when the Board adopted this policy in 1983 it had no knowledge or evidence of any past or continuing discrimination against blacks with respect to the employment of teachers. Similarly, it had not conducted a new statistical analysis of its work force and had no information indicating any underutilization or underrepresentation of blacks in its teacher work force. 832 F.Supp. at 839.

Finally, in January 1985, the Board issued a second addendum to the 1975 program, which contained an analysis dividing the work force into ten categories and comparing utilization of minorities and females in these categories with the availability of these groups in the Middlesex County labor force. No discrimination or underutilization was found:

> The comparison of the percentages in the job category of "Educational Professionals", 90% of which were teachers, revealed that while 5.8% of the available labor market in Middlesex County was black, 9.5% of the educational professionals employed by the Board were black. Moreover, the addendum's analysis of underutilization in each of the job categories by race, national origin, and sex indicated that because the percentage of black educational professionals employed by the Board exceeded the percentage of blacks in the Middlesex County labor market, there was no underutilization of blacks in the Board's teacher work force. Thus, the Board did not establish any goal with respect to hiring additional black teachers. [This] was the last such analysis prior to the termination of Taxman in 1989. 832 F.Supp. at 839.

The Board invoked this departmental "diversity" rationale for the first and only time in terminating Taxman in May, 1989 -- rather than breaking the tie by drawing lots, as it had done in the past. It was undisputed that the Board did not act for the purpose of remedying past violations, or rectifying any imbalance between its professional staff and the availability of African-Americans in the general work force or the county pool of qualified schoolteachers, or to redress some other violation of Federal law. Rather, the Board's purpose was to justify terminating a tenured white teacher in order to ensure the continued employment of a black teacher in a particular department, a small subset of a conceded racially diverse faculty. The Board has stipulated that, had Williams been terminated in lieu of Taxman, "it would not have resulted in blacks being under-represented in [Piscataway Township's] teaching work force as a whole, when compared with the representation of blacks in the teacher work force of Middlesex County".

After Taxman was laid off, she filed a charge with the Equal Employment Opportunity Commission, alleging that she had been subjected to discrimination on account of her race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. The charge was referred to the U.S. Department of Justice, and the United States filed a Title VII suit against the Board in which Taxman intervened.

On cross-motions for summary judgment, the District Court found that the Board had violated Title VII, 832 F.Supp. 836 (D.N.J. 1993). The trial court held that the Board's asserted "non-remedial purpose of promoting racial diversity 'for education's sake' or 'as an educational goal' in a department, but not in the Board's teacher work force" was not a permissible basis for the use of race under Title VII. 832 F.Supp. at 845.

As an alternative ground, the Court held that even if the Board's affirmative action policy had been established for a permissible purpose under Title VII, the policy was not narrowly tailored to achieve that purpose without "unnecessarily trammel[ing] the interests of the white employees", United Steelworkers v. Weber, 443 U.S. 193, 208 (1979). The Court presented four reasons in support of its alternative ground. First, "the Board's minority preference applies to layoff decisions." 832 F.Supp. at 849. Second, unlike the plans sustained in the Supreme Court's decisions in Weber and Johnson v. Transportation Agency, 480 U.S. 616 (1987), "the Board does not even suggest that its plan is temporary and there is no indication that the plan is to be reassessed with any regularity, or, for that matter, at all. ... If the goal of the plan is to enrich the educational experience of the students by employing a more diverse faculty, this goal will be achieved at some point. What the point will be, however, is wholly unclear for the 'diversity' which is sought is nowhere defined." 832 F.Supp. at 850. Third, even if the Board had defined its "diversity" objective, its plan "does not indicate that it will end when diversity is achieved." The plan thus posed the potentially significant burden on non-minorities of a "limitless plan, harkening back to the Supreme Court's rejection in Wygant [v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986)], of measures which are 'timeless in their ability to affect the future.'" Finally, "[c]onspicuously absent here is evidence that the Board has tried or considered alternative and less burdensome means to achieve diversity in its faculty." 832 F.Supp. at 851. Judge Barry concluded, "even if faculty diversity were a purpose on which a race-conscious plan could be based, the plan presented here would be struck down as overly intrusive to the rights of non-minorities." Id.

On appeal, the Board challenged only the trial court's legal conclusions, and did not take issue with any of its factual determinations. The Court of Appeals, sitting in banc, affirmed the judgment of the District Court. 91 F.3d 1547 (3d. Cir. 1996). The Court held that "affirmative action plans" are valid under Title VII only when they (1) "have purposes that mirror those of the statute", and (2) do not "unnecessarily trammel the interests" of non-minority employees. Id. at 1550. The Court concluded that the Board's policy did not satisfy either requirement.

With respect to the first requirement, the Court stated that "unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute." 91 F.3d at 1557. Given the Board's repeated acknowledgement that its affirmative action policy was not adopted for a remedial purpose of any kind, the Court had no occasion to spell out all conceivable remedial purposes permissible under Title VII. It simply noted that the Board's "sole purpose in applying its affirmative action policy ... was to obtain an educational benefit which it believed would result from a racially diverse faculty", and that the Board did not even attempt to show that its plan was adopted "to remedy past discrimination or as the result of a manifest imbalance in the employment of minorities." Id. at 1563 (quoting District Court's opinion).

As for the second requirement, the Appeals Court concluded that even if faculty diversity were a permissible objective, the Board's policy "unnecessarily trammels [non-minority] interests." 91 F.3d at 1565. First, the Court noted that the Board's policy suffered from an "utter lack of definition and structure"; it was thus bereft of objectives and benchmarks which serve "to evaluate progress, guide the employment decisions at issue and assure the grant of only those minority preferences necessary to further the plan's purpose." Id at 1564. Whereas these safeguards were present in the plans upheld in Weber and Johnson, here "the Board's policy, devoid of goals and standards, is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose." Id. Second, the Board's policy constituted a form of "'outright racial balancing' in violation of Weber's second prong" because the policy "adopted in 1975 is an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believes that the ratio between Blacks and Whites in any Piscataway school is skewed." Finally, the Court stressed the detrimental impact of racial preferences for allocating layoffs: "[W]e are convinced that the harm imposed on a non-minority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion," especially "where, as here, the non-minority employee is tenured."

STATUTORY LANGUAGE

We begin with the language of §703 of Title VII. Section 703(a) provides:
It shall be an unlawful employment practice for an employer:

> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> (2) To limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely

> affect his status as an employee, because of such individual's race, religion, sex or national origin.42 U.S.C. §2000e-2 (emphasis added).

When Congress amended Title VII in 1972 to include governments within the covered class of employers, it made no change in the "substantive standards governing employer conduct." Johnson, supra at 627-28 n.6.

Section 703's prohibition against race-based discrimination is categorical, on its face admitting of no exceptions. Congress pointedly excluded race from the types of classifications in §703(3) that might constitute "a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise. ..." 42 U.S.C. §2000e2(e).

The protections of §703(a) clearly extend to non-minorities, like Taxman, complaining of discrimination because of their race. See, McDonald v. Santa Fe Trail Transp., Co., 427 U.S. 273, 283 (1976) (Title VII "prohibits all racial discrimination in employment, without exception for any group of particular employees") (emphasis in original); also, Griggs v. Duke Power Co., 401 U.S. 424-431 (1971) ("[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"); Furnco Construction Co. v. Waters, U.S. 567, 579 (1978) ("the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force") (emphasis in original).

The Supreme Court, in Weber, supra, adopted a nonliteral reading of §703(a) -- departing from the plain meaning of the statute as confirmed by the legislative history—but it did so solely in order to afford some allowance for employers to use racial preferences in the remedial context. The Court reasoned that, in light of the failure expressly to provide that Title VII does not "permit racially preferential integration efforts", 443 U.S. at 205 (emphasis in original) and the strong emphasis Congress placed on encouraging voluntary compliance, Title VII would not be interpreted as "the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." Id. at 204 (emphasis added).

Without defining the outer limits of affirmative action for remedial purposes, the Weber Court held that the purposes of the plan in that case did "mirror those of the statute", in that they were "designed to break down old patterns of racial segregation and hierarchy". Id. at 208. The plan sought to increase the number of qualified black craft workers available to the employer and thus redress the persisting effects of widespread "exclusion from crafts on racial grounds ... [judicial findings of which were] so numerous as to make such exclusion a proper subject for judicial notice". Id. at 198 n.1 (emphasis added).

Johnson extended the approach in Weber by permitting race-based measures to redress "a 'conspicuous ... imbalance in traditionally segregated job categories.'" 480 U.S. at 630 (quoting Justice Blackmun's concurrence in Weber, 443 U.S. at 209) (emphasis added). Justice Brennan noted for the Court, however, that "[t]he requirement that the 'manifest imbalance' relate to a 'traditionally segregated job category' provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed." 480 U.S. at 632 (emphasis added).

In her opinion concurring in the judgment, Justice O'Connor insisted that "an affirmative action program ... that can be equated with a permanent plan of 'proportionate representation by race and sex' would violate Title VII." 480 U.S. at 656. On the facts of the case before the Court, Justice O'Connor was satisfied that "respondents had a firm basis for adopting an affirmative action program." Id. She noted that "at the time the plan was adopted, there were no women in its skilled craft positions", even though it was conceded that "women constituted approximately 5% of the local labor pool of skilled craft workers in 1970. ... Thus, when compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a prima facie Title VII case brought by unsuccessful women job applicants...." Id. (Emphasis in original)

LEGISLATIVE HISTORY

The limitations, placed by the Court on its holdings in both Weber and Johnson reflect the Court's awareness that the exceptions from race neutrality it was prepared to recognize cut against the grain of the shared understanding of Title VII's Congressional supporters and opponents alike. An examination of the Legislative History of Title VII confirms that Congress meant what it said in §703, and left little room, if any, for nonremedial, operational purposes.

As the Court noted in Weber, Title VII's opponents raised "two related arguments against the bill. First, they argued that the Act would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act." 443 U.S. at 205 (emphasis in original).

Weber found that Congress clearly addressed the first objection by enacting §703(j), 42 U.S.C. §2003-2(j). No change was needed, however, to respond to the second objection raised by opponents—that employers would react to Title VII's directive by engaging in race-based hiring and promotion decisions—because, as Title VII's supporters repeatedly emphasized, Title VII itself would prohibit such discrimination.

Early in the House's consideration of H.R. 7152 -- the bill that would become the Civil Rights Act of 1964 -- Representative Celler, chair of the Judiciary Committee and the individual responsible for introducing the legislation in that Chamber, emphasized that "[t]he bill would do no more than prevent ... employers [from] discriminating against or in favor of workers because of their race, religion or national origin." 110 Cong.Rec. 1518 (1964) (emphasis added).

In the extensive debate over the bill in the Senate, H.R. 7152's supporters returned again and again to the theme that Title VII required race neutrality in employment decisions. Senator Humphrey, the majority whip and perhaps the bill's prime moving force in the Senate, responded to a political advertisement's charge that the word "discrimination" in the bill would come to mean requirements of racial balance:

> [Title VII] does not limit the employer's freedom to hire, fire, promote or demote for any reasons—or no reasons—so long as his action is not based on race. ... [T]he meaning of racial or religious discrimination is perfectly clear. ... [I]t means a distinction in treatment given to different individuals because of their different race, religion or national origin. ...110 Cong.Rec. 5423 (1964).

A RACE-CONSCIOUS ADVERSE EMPLOYMENT DECISION

It is clear from the preceding discussion of Title VII's language and legislative history that Sharon Taxman suffered discrimination in her employment conditions "because of" her race within the meaning of §703(a). The impact on her employment status was indisputable: Absent the District Court's ruling, Taxman after her rehiring would have been deprived of back pay and seniority credit for the period of her separation from the school district. Should any layoff be required in her department in the future, she would be treated as the most junior member of the department, perpetually behind Williams who started the same day but was the beneficiary of the Board's 1983 Action Policy. Similarly, the racial thrust of the Board's policy cannot be controverted. If both Taxman and Williams had the same skin color, the Board would have (1) at the least, adhered to its then-unbroken past practice of casting lots to decide whom to terminate; (2) avoided finding a tie in the relevant seniority category; or (3) found some means of breaking any "perceived" tie through a nuanced consideration of the respective qualifications and teaching records of the two individuals.

THE ABSENCE OF A RACE-BASED BFOQ

The Board argued that the Court should carve out an additional exception for "non-remedial" race-based measures crafted to meet supposed operational needs of covered employers. The Board's argument created an especially heavy burden because Congress took pains in 1964 to exclude "race" from the categories of discrimination that, by virtue of §703(e), might constitute "a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of [the] particular business or enterprise. ..." 42 U.S.C. §2000e-2(e). See, 110 Cong.Rec. 2550 (1964) (House's rejection by voice vote of an amendment offered by Congressman Williams (D. Miss.) to add race and color as factors that could constitute "bona fide occupational qualification[s]" for employment.) The Board's proffered "operational needs" exception thus would seem foreclosed by the judgment of Congress that racial classifications were so problematic that race could never be a "BFOQ".

THE ABSENCE OF EXIGENT CIRCUMSTANCES

The Board also suggested that exigent circumstances existed that permitted it to fire Taxman while retaining Williams. It suggested hypotheticals, such as black undercover agents used to infiltrate a black gang, or black guards needed to quell explosive prison conditions involving black inmates, identify situations where arguably the public employer's mission is incapable of being successfully performed on a race-neutral basis. Courts when faced with this argument have rejected a race-based BFOQ in circumstances analogous to these hypotheticals. See, e.g., Sega v. Civiletti, 508 F.Supp. 690, 713 (D.D.C. 1981), aff'd in rel. part sub nom. Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) ("pattern of disparate assignments" of black agents to undercover work). Racial job assignments—premised on the view that only minority group members can effectively serve predominantly minority communities—reflect either (1) an impermissible stereotype that "blacks work better with blacks", Knight v. Nassau County Civil Service Comm'n, 649 F.2d 157, 162 (2d. Cir. 1981) (transfer of black from agency's test development division to recruitment division for the purpose of recruiting minority applicants), or (2) the "erroneous belief that it is proper to base employment decisions on customer preferences where the customers in question are black", Rucker v. Higher Educational Aids Board, 669 F.2d 1179, 1182 (7th Cir. 1982) (alleged non-retention of white counselor because of opposition from black community group). See, generally, Browne, *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 12 Lab. Law 451 (1997).

THE BOARD'S "DELIBERATE ATTEMPT TO MAINTAIN A RACIAL BALANCE"

In Piscataway, the Board's pursuit case of racial diversity at the departmental level, despite its already having achieved a racially diversified faculty, constituted a "deliberate attempt to maintain a racial balance". On this ground alone, the Board's actions exceed the proper bounds of racial preference programs under Weber and Johnson.

Mindful of the unmistakable message of Senators Clark and Case's interpretative memorandum that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII", 110 Conq. Rec. 7213 (1964), the Court emphasized in Weber that "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." 433 U.S. 208. The majority in Johnson similarly noted that "the Agency's Plan was intended to attain a balanced work force, not to maintain one." 480 U.S. at 639 (emphasis in original).

Under Weber and Johnson, once the Board achieved a racially diversified work force in the relevant category of teaching professionally, it could not lawfully continue to use racial preferences to maintain that racial balance, even if it chooses now, for purposes of evaluating its diversity record, to subdivide its work force into smaller and smaller units, each of which must ensure the requisite level of minority group representation. Whatever the employer's stated justification—the Board's interest in avoiding an all-white Business Education Department, a law firm's interest in avoiding an all-white antitrust department, a law school's interest in avoiding an all-white corporate law faculty, and so on—the attainment of a balance between utilization and availability of qualified minorities in the labor market marks the outer limit of race-based preferences permissible under Title VII.

For Title VII to be read to allow racial preferences to continue to inform employment decisions after a diversified work force has been achieved is to invite, not an end to racism, but the entrenchment of race-based employment practices that over time will unravel the decades of racial progress that are Title VII's proudest legacy. As Morris Abram has observed: "In the absence of any neutral decision-making mechanisms, the attempt to end discrimination through color-conscious remedies must inevitably degenerate into a crude political struggle between groups seeking favored status. Once we have abandoned the principles of fair procedure, equal opportunity, and individual rights in favor of the advancement of a particular group, we have opened wide the door to future abuses of all kinds." Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1312, 1321 (1986).

THE BOARD LACKED A "COMPELLING INTEREST" FOR ITS RQCE-BASED LAYOFF DECISION

The Board invited the Supreme Court to import into Title VII the "strict scrutiny" test applicable under the Equal Protection Clause. To read the "strict scrutiny" test into Title VII would create the anomaly of either holding public employers to a different standard than private employers under the same law, or transposing to the private sector a standard whose provenance is the Fourteenth Amendment's limits on governmental action.

Even if we disregard these dispositive impediments and assume, for the sake of discussion, that "strict scrutiny" is the appropriate test under Title VII at least for public employers, it is clear on this record that the Board lacked a "compelling interest" for its race-based layoff of Sharon Taxman.

THE BOARD FAILED TO "CLEARLY ARTICULATE" THE NEED AND BASIS FOR A RACIAL CLASSIFICATION

The Board plainly failed to "clearly articulate[ ] the need and basis for a racial classification", as the Court has required even of Congressional programs in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995), quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting). As Justice Powell stated in his plurality opinion in Wygant v. Jackson Bd. of Educ., 476 U. S. 276, 277 (1986), "a public employer like the Board must ensure that ... it has convincing evidence that remedial action is warranted." The Board has this burden irrespective of which party has the ultimate burden of persuasion in the event the proof is in equipoise (which is plainly not true in the instant case): "But unless such a determination is made, an appellate court reviewing a challenge by non-minority employees to remedial action cannot determine whether the race--based action is justified. ..." Id. at 278.

It is undisputed that the Board made no determination that there were special operational problems in its Business Education Department requiring the use of a racial preference. No determination was made that the students in that department had a special need for instruction in racial tolerance somehow necessitating that the instructor be of a particular race. Without this showing, "diversity" will in short order become the new talisman for maintaining racial preferences in our society.

"Strict scrutiny", the Court in Adarand made clear, is not "'strict in theory, but feeble in fact.'" "The purpose of strict scrutiny is to 'smoke out' illegitimate uses of race. ..." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality op.). Governments employing racial preferences "can survive that intense scrutiny only if [they] show that they are motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern. They must show that they had to do something and had no alternative to what they did. The concern and the response, moreover, must be substantiated and not merely asserted." Wittmer v. Peters, 87 F.3d 916, 918 (7th 1996), cert. denied, 117 S.Ct. 949 (1997) (emphasis added). requisite substantiation was plainly missing in this case.

RACIAL DIVERSITY "FOR EDUCATION'S SAKE" IS NOT A COMPELLING JUSTIFICATION FOR EMPLOYMENT TERMINATION DECISIONS

The "diversity" justification subsumes a host of problematic assumptions—that only black instructors can teach black students, that only black policemen can instill confidence and evoke a cooperative spirit in black neighborhoods, that tolerance and the virtues of cultural diversity can be communicated only by persons of the requisite skin color. "[T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they think or act." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

The "diversity" rationale was used to confer racial preferences beyond what was needed to avoid "manifest imbalance". Such "a use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 12. As the Court (per Justice Kennedy) observed in Miller v. Johnson, 515 U.S. 900, 115. S.Ct. 2475, 2486 (1995) (internal citations omitted):

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." They also cause society serious harm.

"Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." Palmore v. Sidoti, 466 U.S. 429, 432 (1984). "By treating free-thinking individuals as 'intellectual captives of their skin color', race-based affirmative action traps true diversity within a racial straitjacket." Chen, *Diversity and Damnation*, 43 U.C.L.A. L. Rev. 1839, 1894 (1996).

Perhaps, as Justice Powell believed in his opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), universities have a special need to consider race as one of many factors relative to their individualized assessment of thousands of admissions applications. For Justice Powell, "a diverse student body" could be "a constitutionally permissible goal for an institution of higher education." Id. at 311-312. His reasoning was deeply informed by the values of "academic freedom" that long have been viewed as "a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." Id. at 312.

In this regard, universities are strikingly different from public high schools. The public schools are not enclaves of autonomy specially protected from State regulation. Indeed, they are required by law to admit all students in the community, and State law dictates which courses must be taken if students are to graduate. See, N.J.A.C. 6:8-7.1(c). No constitutionally sanctioned tradition of unregulated academic freedom insulates their decisions from customary constitutional scrutiny.

University admissions decisions also differ critically from local school boards' employment decisions. Unlike the nuanced, multi-faceted decision-making process that many universities employ in deciding which students to admit—a process that arguably defies the standard "underutilization" analysis of employment discrimination law—school boards, like other employers, are able to determine whether their employment decisions have an adverse impact on available, qualified members of minority groups without resorting to racial preferences.

Finally, universities making admissions decisions arguably may have some need for proxies in lieu of individualized determinations, whereas school boards in their termination decisions plainly do not. The latter have no legitimate interest in using race as a proxy for unknowable but desired characteristics because they have available to them direct personal experience with the individuals targeted for the layoff; they should therefore be able to make judgments based entirely on the known performance records and other relevant characteristics of those individuals.

THE ABSENCE OF A WELL-DEFINED PLAN FOR ACHIEVING DIVERSITY

The Board's 1983 policy—which does not refer to "diversity" at all and was ostensibly promulgated for the purpose of making "a concentrated effort to attract women candidates ... and minority personnel for all positions"—worked in practice as a wholly discretionary racial preference system, triggered "when candidates appear to be of equal qualification ..." (emphasis added). As the Appeals Court ruled, the policy did not "define 'racial diversity'" and did not "determine what degree of racial diversity in the Piscataway School is sufficient." 91 F.3d at 1564. The Court determined that under *Weber* (at 193) and *Johnson* (at 621-22), affirmative action plans, even for educational diversity purposes, must have "objectives, as well as benchmarks ... to evaluate progress, guide the employment decisions at issue and assure the grant of only those minority preferences necessary to further the plans' purposes." 91 *F.3d* at 1564. Absent these safeguards, the policy "is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose."

Definitions and criteria for assessing progress are critical when government employers use "diversity" as a justification for preferring members of one group over another, especially in the absence of past discrimination or statistical imbalance. "Is a diverse faculty one which is 10% minority, 20% minority, or 50% minority?" 832 *F.Supp.* at 850. The pursuit of diversity in the absence of pre-established, ascertainable limits harkens back to *Wygant*'s rejection of measures, which are "timeless in their ability to affect the future.", 476 *U.S.* at 276.

THE UNLIMITED DURATION OF THE BOARD'S POLICY

As the Appeals Court determined, "[t]he Board's policy, adopted in 1975, is an established fixture of unlimited duration to be resurrected from time to time whenever the Board believes that the ratio between Blacks and Whites in any Piscataway school is skewed." 91 F.3d at 1564. "Even if 'diversity' were defined, the plan does not indicate that it will end when diversity is achieved." 832 F.Supp. at 850. Such a policy does not involve a "temporary" measure that seeks to "attain" rather than "maintain" a "permanent racial ... balance." Johnson (at 639-40); Weber (at 208).

THE FAILURE TO CONSIDER ALTERNATIVES TO RACIAL PREFERENCES AS A MEANS TO PROMOTE DIVERSITY

Whereas Congress, in Metro Broadcasting, supra (overruled Adarand, supra), endorsed minority preferences "only after long study and painstaking consideration of all available alternatives" (Id. at 584), here there is no "evidence that the Board has tried or considered alternative or less burdensome means to achieve diversity in its faculty." 832 F.Supp. at 851.

EVEN IF TITLE VII PERMITS NON-REMEDIAL USE OF RACE IN SOME SETTINGS, RACIAL PREFERENCES CANNOT BE USED TO DETERMINE JOB DETERMINATIONS

Finally, if we put all else aside, under Title VII government may not terminate someone's employment because of his or her race.

The burden of racial preferences, whatever their social utility may be, cannot be visited entirely on innocent non-minority (or minority) group individuals. The Court in Weber, as part of its "narrowly tailored" inquiry, emphasized:

> At the same time the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. 443 U.S. at 208.

So, too, in Johnson:

> [D]enial of the promotion unsettled no legitimate, firmly rooted expectation on the part of petitioner. Furthermore, while petitioner in this case was denied a promotion, he retained his employment with the agency, at the same salary and with the same seniority, and remained eligible for other promotions. 480 U.S. at 638.

It was only because of these facts that the Court could conclude that the California agency's preference program "visits minimal intrusion on the legitimate expectations of other employees." Id. at 640.

Race-based layoff decisions are particularly problematic in the case of tenured employees. It was Congress' much-debated, considered judgment in

§703(h) of Title VII, 42 U.S.C. §2000e-2(h), that seniority-based expectations must be protected even where employers have been guilty of pre-Title VII intentional discrimination or their seniority systems have the effect of perpetuating the effects of past discrimination. See, Teamsters v. United States, 431 U.S. 324 (1977); United Air Lines v. Evans, 431 U. S. 553 (1977); American Tobacco Co. v. Patterson, 456 U. S. 63 (1982). Thus, in the context of fashioning remedies for post-Act intentional discrimination by employers, §703 (h) limits the award of remedial seniority to "rightful place" seniority; even proven victims of discrimination cannot use their remedial seniority to displace innocent non-minorities, but must await vacancies as they arise. Teamsters, supra, at 330 n.4, 371-76; Franks v. Bowman Transp. Co., 424 U.S. 747, 770-72 (1976).

Even the Court's earliest proponent of the "diversity" justification for racial preferences (at least in the context of university admissions decision) drew the line at layoffs:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Wygant, supra, at 283 (Powell, J., plurality op.) (citations omitted).

Employers do not need racial preferences in layoff and termination decisions in order to achieve diversity in their work forces. In layoff and termination decisions, employers are dealing with the known qualities of the individuals under review; they have no legitimate interest in the use of race as a proxy for desired qualities. Title VII does not tolerate the use of racial proxies in the layoff-termination context.

CONCLUSION

The Taxman case was not about affirmative action, the problem of racial inequality, university admissions decisions, or the use of black undercover agents to infiltrate a black gang. It was about an abuse of the concept of affirmative action—racial preferences used to ensure the racial composition of a small high school department, even though the School Board had repeatedly asserted in the litigation and in reports to governmental authorities that it had experienced no past discrimination and that it had no problem of underutilization of available minority teachers. The Board's faculty was racially diverse, and alternative non-racial means were readily available to "send" a "message" that the School Board took seriously the values of tolerance and cultural diversity. Absent a remedial justification, Title VII requires race neutrality in employment decisions.

Why did the case create so much notoriety? The kicker, ignored at each level—the Justice Department, the White House, U.S. District Court, Circuit Court of Appeals, and U.S. Supreme Court—by all decisionmakers: The fact that the Board's use of race was illegal and forbidden under New Jersey law.

Although N.J.S.A. 18A:28-9 authorizes a Board of Education to abolish positions, N.J.S.A. 18A:28-10 forbids the use of race as a reason for termination:

> Dismissals resulting from any such reduction shall not be made by reason of ... race ... but shall be made on the basis of seniority according to standards to be established by the Commissioner with the approval of the State Board.

See, Bierman v. Board of Education of the Borough of Glen Rock, 1980 S.L.D. 809, 823 (N.J. Comm'r of Educ., July 17, 1980) ("The Commissioner finds nothing in the goals established for Affirmative Action programs or in the rules and regulations that establish standards to be applied as guidelines in the situation of a reduction in force that refute or delimit the seniority status earned by tenured teaching staff members."), aff'd, 1981 S.L.D. 1391 (N.J. Board of Educ., Dec. 2, 1981), aff'd, 1983 S.L.D. 1552 (N.J. Super. Ct., App. Div., May 4, 1983)

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